No. 87-6700-CFH
Status: GRANTED
CAPITAL CASE

Docketed:
March 29, 1988

Title: John Henry Selvage, Petitioner
v.
James A. Lynaugh, Director, Texas Department of Corrections

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Burr,Richrd H.

Counsel for respondent: Walt,Robert S.

3-29-88 Application to stay 3-30-88 execution filed (A-741)

Entry	Date	Note	Proceedings and Orders
1	Mar 29 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Mar 29 1988		a writ of certiorari.
6	Mar 29 1988		Application for stay of execution filed.
7	Mar 29 1988		Application for stay presented to Justice White and referrd to the Court.
8	Mar 29 1988		Application for stay granted by Order of the Court. White and O'Connor, JJ., would deny the application.
9	Apr 1 1988		Response to application received.
10	May 9 1988		Brief of respondent James A.Lynaugh, Director in opposition filed.
11	May 11 1988		DISTRIBUTED. May 26, 1988
12	May 25 1988	X	Reply brief of petitioner John H. Selvage filed.
13	Jun 17 1988		REDISTRIBUTED. June 23, 1988
16	Jun 24 1988		REDISTRIBUTED. June 29, 1988
17	Jun 25 1988	X	Supplemental brief of petitioner John H. Selvage filed.
18	Jun 23 1989		REDISTRIBUTED. June 29, 1989
20	Jul 3 1989		REDISTRIBUTED. September 25, 1989
21	Jul 3 1989		REDISTRIBUTED. September 25, 1989
23	Sep 29 1989		REDISTRIBUTED. October 6, 1989
25	Oct 10 1989		Petition GRANTED. limited to Question 1 presented by the petition, but rephrased as follows: "At the time petitioner was tried,was there 'cause' for not raising a claim based upon arguments later accepted in Penry v. Lynaugh,No. 87-6177 (June 26, 1989); and if not, would the application of a procedural bar to the claim result in a 'fundamental miscarriage of justice,' Smith v. Murray, 477 U.S. 478 (1986)?" **********
26	Nov 9 1989	D	Motion of petitioner to suspend briefing and further consideration filed.
27	Nov 9 1989	D	Motion of petitioner to certify question to Court of Criminal Appeals of Texas filed.
28	Nov 13 1989		DISTRIBUTED. NOV. 22, 1989. (MOTION TO CERTIFY QUESTION TO COURT OF CRIMINAL APPEALS OF TEXAS, AND MOTION TO SUSPEND BRIEFING AND FURTHER CONSIDERATION).
29	Nov 13 1989		Joint appendix filed.
30	Nov 16 1989		Opposition of Respondent to motion of petitioner to certify

No. 87-6700-CFH

Entry	Date	Note	Proceedings and Orders
			question to Court of Criminal Appeals of filed.
31	Nov 16 1989		Opposition of Respondent to motion of petitioner to suspend briefing and further filed.
32	Nov 20 1989	X	Brief of petitioner in reply to respondent's opposition to motions to certify question and to suspend briefing filed.
36	Nov 25 1989		Order extending time to file brief of petitioner on the merits until November 27, 1989.
33	Nov 27 1989		Motion of petitioner to suspend briefing and further consideration DENIED.
34	Nov 27 1989		Motion of petitioner to certify question to Court of Criminal Appeals of Texas DENIED.
37	Nov 27 1989		SET FOR ARGUMENT WEDNESDAY, JANUARY 17, 1990. (3RD CASE)
40	Nov 27 1989		Brief of petitioner John H. Selvage filed.
41	Nov 27 1989		Brief amicus curiae of Harris County Criminal Lawyers Assn. filed.
42	Nov 27 1989		Brief amicus curiae of Harvey Earvin filed.
38	Nov 29 1989	G	Application (A89-421) by petitioner to file a brief on the merits in excess of page limits, submitted to Justice White.
39	Nov 30 1989		Application (A89-421) granted by Justice White, allowing a maximum of 117 pages.
43	Dec 20 1989		CIRCULATED.
44	Dec 28 1989	X	Brief amicus curiae of Criminal Justice Legal Foundation filed.
45	Dec 30 1989	X	Brief of respondent James A.Lynaugh, Director filed.
46	Jan 8 1990	G	Application (A89-501) by respondent to file a brief on the merits in excess of page limits, submitted to Justice White.
47	Jan 8 1990		Application (A89-501) granted by Justice White, allowing a maximum of 65 pages.
48	Jan 10 1990	X	Reply brief of petitioner John H. Selvage filed.
49	Jan 17 1990		ARGUED.

87-6700

No. 87 - _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

RECEIVED
MAR 29 1988
11:59 a.m.
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID CUNNINGHAM
Texas Bar No. 05234400
1927 Norfolk
Houston, Texas 77098
(713) 520-7701

JULIUS L. CHAMBERS
* RICHARD H. BURR, III
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-1900

GEORGE KENDALL
31 Elm Street, Ste. 236
Springfield, MA 01103

ATTORNEYS FOR PETITIONER

* Counsel of Record

MAR 29 '88 11:24 FROM NAACP LEGAL DEFENSE PAGE.003

QUESTIONS PRESENTED

1. Whether procedural default on a Franklin v. Lynaugh claim can be found without first examining the complete record of judicial response to such a claim at the time it could have been timely raised, and without examining whether the need to avoid a "fundamental miscarriage of justice" calls for avoidance of the procedural default rule?

2. Whether a condemned Texas prisoner who presents the same issue that is before the Court in Franklin v. Lynaugh must have his execution stayed pending the decision of Franklin.

3. Even if the Court decides in Franklin v. Lynaugh that the Texas death penalty statute does not preclude the jury's consideration of mitigating circumstances in violation of the Eighth Amendment, whether a condemned Texas prisoner must be given the opportunity to show that reasonably effective counsel could nevertheless have construed the statute as precluding the consideration of some mitigating circumstances, and that, because his lawyer held this view, relevant mitigating evidence was not investigated or presented on his behalf, thereby depriving him of the assistance of counsel and of an individualized sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments?

4. Whether the pendency before the en banc Fifth Circuit in another case of the very same issue raised by petitioner requires that petitioner's case be held for the en banc decision and precludes the panel before whom petitioner's case is heard from deciding the merits of that issue itself?

MAR 29 '88 11:25 FROM NAACP LEGAL DEFENSE PAGE.005

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Course of Prior Proceedings	2
B. Material Facts	3
1. The Franklin Claim	3
2. The Claim That The Texas Death Penalty Statute Interfered With Defense Counsel's Investigation And Presentation Of Mitigating Evidence	6
3. The Claim Concerning The Right To Voir Dire On The Meaning Of A Life Santance In Texas	9
HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW	9
REASONS FOR GRANTING CERTIORARI	10
I. The Fifth Circuit's Procedural Default Holding Raises Questions Not Previously Addressed By The Court Which Will Continue To Be Raised If The Court Ultimately Grants Relief In Franklin v. Lynaugh	10
II. When The Procedural Questions Are Put Aside, Mr. Selvage Presents The Same Issue That Is Before The Court In Franklin v. Lynaugh	14
III. Even If The Court Decides In Franklin That The Texas Death Penalty Statute Does Not Preclude The Jury's Consideration Of Mitigating Circumstances In Violation Of The Eighth Amendment, A Condemned Texas Prisoner Should Be Allowed The Opportunity To Show That Reasonably Effective Counsel Could Nevertheless have Construed The Statute As Precluding The Consideration Of Some Mitigating Circumstances, And That Because His Lawyer Held This View, Relevant Mitigating Evidence Was Not Investigated Or Presented On His Behalf, Thereby Depriving Him Of The Assistance Of Counsel And Of An Individualized Sentencing Determination, In Violation Of The Sixth, Eighth, And Fourteenth Amendments	16

MAR 29 '88 11:25 FROM NAACP LEGAL DEFENSE PAGE.007

Page

IV. Barefoot v. Estelle Required A Stay Of Execution And Plenary Consideration Of Mr. Selvage's Voir Dire Claim In The Fifth Circuit, Given The Pendency Before the En Banc Fifth Circuit Of The Same Claim In Another Case, The Outcome Of Which Would Control The Disposition Of Mr. Selvage's Appeal .. 19

CONCLUSION 23

MAR 29 '88 11:26 FROM NAACP LEGAL DEFENSE PAGE.028

No. 87 - _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, JOHN HENRY SELVAGE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals was announced on March 28, 1988 and has not yet been reported. A copy of the opinion is annexed hereto as Appendix A. The opinion of the United States District Court for the Southern District of Texas, from which Mr. Selvage took his appeal to the Court of Appeals, is also unreported but a copy is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

MAR 29 '88 11:27 FROM NAACP LEGAL DEFENSE PAGE.010

TABLE OF AUTHORITIES

	Page
Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), rev'd sub nom., Adams v. Texas, 448 U.S. 38 (1980)	12,13
Barefoot v. Estelle, 463 U.S. 880 (1983)	19,22,23
Caldwell v. Mississippi, 472 U.S. 320 (1985)	20
California v. Brown, ___U.S.___, 93 L.Ed.2d 934 (1987)	20
California v. Ramos, 463 U.S. 992 (1983)	16,20
Engle v. Isaac, 456 U.S. 107 (1982)	11,13
Ex parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978)	12,13
Franklin v. Lynaugh, No. 87-5546	passim
Hitchcock v. Dugger, ___U.S.___, 95 L.Ed.2d 347 (1987)	19
Jurek v. Texas, 428 U.S. 262 (1976)	11,12,13,18
King v. Lynaugh, 828 F.2d 257 (5th Cir. 1987)	20,21,22
King v. Lynaugh, 828 F.2d 269 (5th Cir. 1987)	21
Lockett v. Ohio, 438 U.S. 586 (1978)	12,13,14,15
Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App. 1980)	12,13
Reed v. Ross, 468 U.S. 1 (1984)	9,11,13
Skipper v. South Carolina, ___U.S.___, 90 L.Ed.2d 1 (1986)	16
Smith v. Murray, ___U.S.___, 91 L.Ed.2d 434 (1986)	11,14
Strickland v. Washington, 466 U.S. 668 (1984)	19
Turner v. Murray, 476 U.S. 1 (1986)	21
Wainwright v. Sykes, 433 U.S. 72 (1977)	11
Woodson v. North Carolina, 428 U.S. 280 (1976)	15

MAR 29 '88 11:28 FROM NAACP LEGAL DEFENSE PAGE.009

> In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense[;]

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law....

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Mr. Selvage was convicted of capital murder on February 8, 1980, and was thereafter sentenced to death on February 11, 1980, in the District Court for the 230th Judicial District, Harris County, Texas. His conviction and sentence were affirmed by the Texas Court of Criminal Appeals on July 11, 1984. Selvage v. State, 680 S.W.2d 17 (Tex. Crim. App. 1984). No petition for writ of certiorari was filed with respect to this opinion.

Mr. Selvage thereafter filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas. Relief was denied October 6, 1986, and the Fifth Circuit affirmed July 23, 1987. Selvage v. Lynaugh, 823 F.2d 845 (5th Cir. 1987). Certiorari was denied October 2, 1987. Selvage v. Lynaugh, ___U.S.___, 98 L.Ed.2d 268 (1987).

On January 21, 1988, Mr. Selvage filed a state habeas corpus petition in the District Court for the 230th Judicial District, Harris County, Texas. The trial court recommended denial of the petition on March 14, 1988, and on March 21, 1988, the Texas Court of Criminal Appeals adopted the recommendation. Ex parte Selvage, No. 16, 884-02.

On March 22, 1988, Mr. Selvage activated a petition for writ of habeas corpus which had previously been lodged in the United States District Court for the Southern District of Texas. On March 25, 1988 the District Court entered orders dismissing three of the four claims presented by Mr. Selvage, withholding

MAR 29 '88 11:27 FROM NAACP LEGAL DEFENSE PAGE.011

adjudication of the fourth claim because it was identical to the issue pending before the en banc Fifth Circuit in King v. Lynaugh, 828 F.2d 257 (5th Cir.), reh. en banc granted, 828 F.2d 269 (5th Cir. 1987), and granting a stay of Mr. Selvage's execution which was scheduled for March 30, 1988 (after midnight on March 29, 1988).[1] The state then moved the Fifth Circuit to dissolve the stay of execution, and Mr. Selvage appealed from the dismissal of three of his claims and sought a stay of execution in connection with the appeal in the event the District Court's stay was dissolved. On March 28, 1988, the Fifth Circuit granted the state's motion, denied Mr. Selvage's request for a stay, and denied a certificate of probable cause.

B. Material Facts

1. The Franklin Claim

During the penalty phase of Mr. Selvage's trial, the state offered additional evidence to show "a probability" that Mr. Selvage "would commit criminal acts of violence that would constitute a continuing threat to society." R. 112. Two prior federal convictions were introduced, one for possession of controlled substances, the other for conspiracy to commit bank robbery. R. 2894. In neither case was there any indication that any person was harmed.

The state also introduced evidence of Mr. Selvage's attempted escape from the New Orleans parish prison. Captain Ronald Cherry told the jury that on July 22, 1975, while incarcerated in the parish prison, Mr. Selvage escaped. R. 2897. In fact, on cross-examination, the jury learned that, in attempting to escape, Mr. Selvage fell several floors and sustained significant injuries requiring hospitalization. No escape from the institution was effectuated. R. 2902.

Finally, the state presented two witnesses who implicated Mr. Selvage in a robbery/murder at a "Stop & Go" store, committed

[1] On March 28, 1988, the District Court entered a revised order which incorporated the language of Fed. R. Civ. Proc. 54(b), thereby permitting immediate appeal of the decision to dismiss three of the four claims in the habeas petition.

just four days before the robber/murder with which Mr. Selvage was charged in his capital trial. Mr. Selvage was never formally charged with this crime, he was never brought to trial, and to this day he is still presumed innocent of that offense. One witness identified Mr. Selvage before the capital sentencing jury as one of the two assailants in the robbery, although he admitted to having failed to identify Mr. Selvage as an assailant during identification proceedings occurring shortly after the crime itself. R. 2860-61. The other witness also identified Mr. Selvage as one of the two robbers, but he too admitted that before the capital trial, he was shown at least three photo spreads, and in response to each, positively identified persons other than Mr. Selvage as the assailant. R. 2879. Aside from these witnesses' testimony, the state offered no other evidence linking Mr. Selvage to the July 26 incident. During his penalty phase argument, the prosecutor urged the jury to answer the two statutory questions affirmatively, in significant part, because "[w]e know of two robberies and two killings." R. 2968.

The defense offered mitigating evidence through Audrey Picou, Mr. Selvage's older sister. Ms. Picou initially described her brother's upbringing. She told the jury that he had been raised in a very close, religious family, and unlike other children they knew, had been exposed to the arts and music. R. 2895-2912. During his school years, she described Mr. Selvage as being an "A" and "B" student. Id. Throughout his early and school years, Mrs. Picou testified that he was a happy, normal child.

In 1968, she recalled, Mr. Selvage was drafted into the Army. When he was discharged not quite two years later, he came back a different person. In her terms "he came back in a straightjacket." R. 2910. He had become addicted to heroin and spent several months in Army hospital treatment centers. When he finally returned to New Orleans, he was not able to work for a period of time, but later found work at a gas station.

She testified further that she had never seen Mr. Selvage exhibit violent behavior and opined that he was a peaceful

person. This was consistent with their family, she said: no other family member had ever been arrested. She also opined that Mr. Selvage had the strength of character to be rehabilitated.

Finally, the defense called Dr. Jose Garcia, Chief of Mental Health Services for the Texas Department of Corrections. R. 2924. Dr. Garcia described in detail the numerous rehabilitative programs offered by the Department of Corrections to inmates.

The trial court's sentencing charge thereafter was cryptic and made no mention of Mr. Selvage's mitigating evidence. Instead, it focused almost exclusively upon special issues 1 and 2:

> MEMBERS OF THE JURY: By your verdict returned in this case you have found the Defendant guilty of the offense charged in the indictment, that is, Capital Murder, which was alleged to have been committed in Harris County, Texas, on or about the 30th Day of July, 1979.
>
> You are instructed that the punishment for capital murder is by death or confinement in the penitentiary for life.
>
> In connection with your consideration of the evidence presented with respect to the assessment of punishment, I am submitting to you certain issues to be determined by you in accordance with instructions which I shall also give you. The State must prove each issue submitted beyond a reasonable doubt, and you shall return a special verdict of "Yes" or "No" on each issue submitted.
>
> You are not to discuss among yourselves how long the accused would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor, and are no concern of yours.
>
> You are further instructed that you may not answer any issue "Yes" unless you agree thereon unanimously; and you may not answer any issue "No" unless ten (10) or more jurors agree.
>
> ISSUE NO. 1
>
> Do you find from the evidence beyond a reasonable doubt whether the conduct of the defendant, John Henry Selvage, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
> ANSWER: _____

> ISSUE NO. 2
>
> Do you find from the evidence beyond a reasonable doubt whether there is a probability that the defendant, John Henry Selvage, would commit criminal acts of violence that would constitute a continuing threat to society?
> ANSWER: _____

R. 111-112.

2. <u>The Claim that the Texas Death Penalty Statute Interfered with Defense Counsel's Investigation and Presentation of Mitigating Evidence</u>

This claim relied entirely upon proffers of fact outside the trial record. Three areas of material fact were proffered:

First, Mr. Selvage sought to prove that his trial attorneys forewent the investigation and presentation of mental illness as a mitigating circumstance in his case because they believed that the Texas statute precluded the proper consideration of mental illness as a mitigating circumstance. Mr. Selvage's lead trial counsel explained the decision not to investigate and present such evidence in the affidavit he provided to Mr. Selvage's present attorneys, included as Appendix F to the habeas petition:

> My co-counsel and I decided early in our representation of Mr. Selvage that we would not present evidence of mental illness in the penalty phase of the trial, no matter how strong it was, because we believed the jury would not be able to consider such evidence as a mitigating circumstance.
>
> By the time this case was tried in early 1980, the State's use of Dr. Ernest Grigson to show that a capital defendant would likely be dangerous in the future was well known. Whatever the disorder suffered by a capital defendant, from antisocial personality disorder to major mental illnesses like schizophrenia, Dr. Grigson was able to persuade juries that <u>any disorder increased the likelihood</u> that the defendant would be dangerous in the future. Once the jury found that mental illness increased the likelihood of the defendant's future dangerousness, the jury was obliged to answer Special Issue 2 "yes." Through the use of witnesses like Dr. Grigson, therefore, the State was able to convert otherwise mitigating evidence like mental illness into evidence in support of an aggravating circumstance.
>
> Since the jury was able to consider only one other question in Mr. Selvage's case -- the deliberateness question posed by Special Issue 1 -- we were convinced that even if we did present evidence of mental illness, with the problems attendant to Special Issue 2, the jury would still have no meaningful way of considering the mental illness evidence as a mitigating circumstance. The jury could quite readily find that

the homicide was sufficiently deliberate to answer Special Issue 1 "yes" even if Mr. Selvage did suffer from a severe mental illness. In our experience it was rare for jurors to find mental illness so incapacitating as to interfere with a defendant's ability to commit deliberate acts. And if the jury answered Special issue 1 "yes," having already answered Special Issue 2 "yes," the death sentence was mandatory.

Given these considerations, we decided that Mr. Selvage's interests could not be served by investigating and presenting evidence of any mental illness from which he suffered. On the one hand, the jury could be forced to treat such evidence as aggravating, and on the other, the jury was extremely unlikely to consider mental illness as negating the deliberateness of the crime. The jury was given no third option under the Texas statute -- to consider whether the evidence of mental illness was substantial enough as a mitigating circumstance to call for a life sentence, even in the face of the affirmative findings on the special issues. Thus, we could conceive of no way that such evidence could help Mr. Selvage.

If, on the other hand, Texas had offered such a third option to the jury, our strategy would have been different. At the very least, we would have investigated Mr. Selvage's mental health history. And if we had found evidence of serious mental illness, we likely would have presented it. Even though, in such circumstances, evidence of mental illness might still have increased the possibility that the jury would find that Mr. Selvage posed a threat of future violence, the evidence could have served as an even stronger countervailing factor -- as a reason to impose life that was weightier than the reason to impose death because of the threat of future dangerousness. Without investigation, we could not have known if such evidence was available to Mr. Selvage -- so at a minimum, we would have investigated this matter.

Appendix F, Appendix to Petition Writ of Habeas Corpus, at 1-3.[2]

Second, Mr. Selvage offered to prove that his attorneys' understanding of the operation of the Texas statute was reasonable. In connection with this, he conceded that his attorneys' understanding of the statute might have been in error, and that if the Court were to decide Franklin v. Lynaugh, No. 87-5546, against the petitioner, Franklin would show that counsel's understanding was erroneous. Nevertheless, Mr. Selvage contended, if his attorneys understanding were reasonable, he would still have a claim of constitutional error. In this

[2] The same attorney who provided this affidavit provided a second affidavit to the state which was in some ways contradictory of this affidavit. Because no court has ever held an evidentiary hearing to resolve this conflict, the Fifth Circuit took the affidavit appended to the habeas petition as true.

context, Mr. Selvage sought an opportunity to show through the testimony of other Texas criminal defense lawyers that his attorneys' view was a reasonable view of the statute's operation.

Third, Mr. Selvage offered to prove that if his attorneys had not been deterred in the investigation and presentation of mental illness as a mitigating circumstance, they would have discovered substantial evidence that he suffered from a serious mental illness at the time of the crime herein. As set forth in detail in the habeas petition, Mr. Selvage had a well-documented history of psychosis and paranoid schizophrenia by the time he participated in the crime. Id., at pages 17-18 (Air Force medical records), 18-19 (United States Bureau of Prisons medical records). Further, from the time Mr. Selvage was put on death row to the present, Texas Department of Corrections mental health personnel have consistently diagnosed him as suffering from psychosis. Id., at pages 20-22.

In a recent evaluation of Mr. Selvage, Dr. James Merikangas explained that Mr. Selvage's psychosis likely would have substantially impaired his capacity to appreciate the wrongfulness of his criminal conduct or to refrain from engaging in such conduct at that time:

> In my opinion, John Selvage was not fully responsible for his behavior at that time. His psychosis, the residual effects of his severe and long history of drug abuse including opiates and amphetamines, in combination, resulted in a diminished capacity to appreciate the wrongfulness of his conduct and rendered him less than fully capable of conforming his conduct to the requirements of law. According to John, he was high on heroin and amphetamines at the time of the crime. Amphetamines alone can induce a paranoid state and generate increased motor activity, resulting in paranoid ideation and violent acts which may be completely spontaneous or in response to command hallucinations.... The severity of John's psychosis would likely have caused him to misperceive simple gestures as threats and to act on them without any basis in reality. While these combined factors could have produced a violent, uncontrolled outpouring of aggressive behavior, John's use of heroin could have mollified his aggression -- if the dosage were high enough -- and taken away his will to act. In this state, without the ability to perceive the external world accurately and make appropriate judgments in

> response to it because of his psychosis, John could have been peculiarly susceptible to the coercion, influence, and designs of others. In either event, I am of the opinion, to a reasonable medical certainty, that John could not distinguish the boundaries between right and wrong and could not in any way reign in his behavior to conform to the expectations of the external world.

Petition for Writ of Habeas Corpus, at pages 22-23.

3. The Claim Concerning the Right to Voir Dire on the Meaning of a Life Sentence in Texas

Throughout the several days of jury selection in this case, the defense repeatedly attempted to learn what jurors understood a life sentence to mean under Texas law. For example, when defense counsel was questioning potential juror Edward Jefferson, he asked: "[N]ow, Mr. Jefferson, when we talk about a life sentence in the penitentiary what do you think a life sentence is? How long do you think a person has to serve --." R. 934. Before Jefferson was able to answer, the trial court ruled that he could not answer the question. Id. Whenever the questions of parole or the length of a life sentence arose thereafter, the court prevented any inquiry or discussion. See R. 1060-61; 1093-95.

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

The Fifth Circuit decided that Mr. Selvage's claim under Franklin v. Lynaugh -- that the Texas capital sentencing procedure prevented the jury's consideration of the mitigating evidence he presented -- was barred from federal habeas review by procedural default at trial:

> We are not persuaded that Selvage has a likelihood of succeeding on this claim. Selvage's first difficulty is that he did not object to the court's charge at the punishment phase of the trial; he requested no instruction on mitigating evidence, and did not otherwise question the capital sentencing structure on the grounds he now urges .... We find no legal cause for the absence of objection.... [T]he issue is not a recently found legal theory not knowable by competent trial counsel. Reed v. Ross, 468 U.S. 1 (1984) (so novel that its legal basis is not reasonably available). Nor is its rejection by the Texas Court of Criminal Appeals a legal excuse for not objecting....
>
> [Because of the substantiality of the questions raised in Franklin,] the execution of a death sentenced prisoner with a properly preserved and potentially

> valid Franklin claim should be stayed. Our rejection of a stay on this claim then rests only upon Selvage's failure to object to the instruction at the punishment phase or to request additional instruction.

Appendix A, at 10-11, 14.

With respect to Mr. Selvage's related claim -- that the Texas death penalty statute interfered with defense counsel's investigation and presentation of mitigating evidence -- the Fifth Circuit held that the procedural default which barred the Franklin claim also barred this claim which was derived from Franklin:

> Selvage contends that he suffered from ineffective assistance of counsel. As we understand Selvage's argument, it is that the state's process at the penalty phase denies his counsel the opportunity to provide effective counsel. This claim must fail for the reasons that the premise upon which it rests has been rejected.... We are left with a claim of ineffectiveness that is no more than a variation of the Franklin claim.

Appendix A, at 15.

The Fifth Circuit rejected on the merits Mr. Selvage's claim that the Eighth Amendment entitled him to voir dire prospective jurors on the meaning of a life sentence in Texas, holding that instructions to the jury to disregard parole considerations effectively reduced the risk that jurors' misconceptions about the length of a life sentence would influence their sentencing decision:

> If the Texas practice of instructing juries not to consider the effect of parole is sound[,] the refusal to explore veniremens' "understanding" of the subject is an a fortiori case. The point is that the inquiry into parole matters in the selection of a jury cannot be required so long as the state may instruct the selected jury that it cannot consider the subject at all. A contrary assertion borders on the frivolous.

Appendix A, at 7.

REASONS FOR GRANTING CERTIORARI

I.

> THE FIFTH CIRCUIT'S PROCEDURAL DEFAULT HOLDING RAISES QUESTIONS NOT PREVIOUSLY ADDRESSED BY THE COURT WHICH WILL CONTINUE TO BE RAISED IN OTHER CASES AS WELL IF THE COURT ULTIMATELY GRANTS RELIEF IN FRANKLIN V. LYNAUGH.

The Fifth Circuit's procedural default holding in Mr. Selvage's case raises two questions which the Court has not

previously addressed. First, at the time that Mr. Selvage was tried, in February, 1980, was there "cause" for not raising the Franklin claim: was it not "reasonably available to counsel," Reed v. Ross, 468 U.S. 1, 16 (1984), even though the legal basis for the claim was known, when the claim itself had been uniformly rejected by this Court and the Texas Court of Criminal Appeals? Second, if there was no "cause" for failing to raise the Franklin claim, does the application of the procedural default rule of Wainwright v. Sykes, 433 U.S. 72 (1977) to the claim result in a "'fundamental miscarriage of justice,'" Smith v. Murray, ___U.S. ___, 91 L.Ed.2d 434, 446 (1986)? The Fifth Circuit's answers to these questions are too much at odds with the Court's prior decisions to allow them to be the last word for John Selvage or for anyone else similarly situated.

The Fifth Circuit held that there was no cause for failing to raise the Franklin claim at trial, because the legal basis for the claim was known at that time, and the previous rejection of the claim by the Texas Court of Criminal Appeals could not serve to excuse the failure to raise the claim in the state courts. Thus, the Fifth Circuit viewed Mr. Selvage's failure to raise the claim at trial as based upon the futility of doing so. And as the Court has explained, "[P]erceived futility alone cannot constitute cause." Engle v. Isaac, 456 U.S. 107, 130 & n. 36 (1982).

An examination of the state of the law in early 1980 reveals that Mr. Selvage's failure to raise this claim was not based on "perceived futility alone." Most significantly, by early 1980, this Court had on two occasions swept aside any substantial basis for challenging the Texas statute's arguable preclusion of the consideration of mitigating circumstances. In Jurek v. Texas, 428 U.S. 262 (1976), the Court specifically took note of the Texas statute's potential for precluding the jury's consideration of mitigating circumstances, but then found that Texas had avoided this problem by "interpret[ing] [the future dangerousness] question so as to allow a defendant to bring to

the jury's attention whatever mitigating circumstances he may be able to show." Id. at 272. Thus, "Texas law [allows] ... the jury [to] be asked to consider whatever evidence of mitigating circumstances the defense can bring before it." Id. at 273. Again in Lockett v. Ohio, 438 U.S. 586 (1978), the Court reiterated its view that, because of the Texas Court's broad interpretation of the future dangerousness question, the Texas statute did not operate "to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." 438 U.S. at 607.

Even though Jurek and Lockett seemed to preclude any challenge to the Texas statute based upon the statute's constriction of the sentencer's consideration of mitigating circumstances, such challenges were nevertheless brought in three Texas cases that were decided by the Court of Criminal Appeals prior to Mr. Selvage's trial. In Ex parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978), the petitioner argued that the statute "as applied is unconstitutional because it prevents the jury from considering a defendant's mental condition as a mitigating factor in relation to the two or possibly three statutory special issues to be submitted to the jury at the penalty stage of a capital murder trial." Id. at 516. In Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), rev'd on other grounds sub nom., Adams v. Texas, 448 U.S. 38 (1980), the appellant "argue[d] that [mitigating] evidence is of no avail to the defendant if the jury is convinced by the evidence ... that the punishment issues should be answered affirmatively," because "the punishment of death is [then] mandatory even though the jury, on the basis of the mitigating evidence, may believe that death is inappropriate." 577 S.W.2d at 729. And in Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App. 1980), the appellant argued that "an explanatory charge is necessary to keep the jury from disregarding the [mitigating] evidence properly before it." Id. at 947.

All of these challenges were rejected by the Texas court, but more importantly, they were rejected by reference to and reliance upon the Court's analyses in Jurek and Lockett, see Quinones, 592 S.W.2d at 947; Adams, 577 S.W.2d at 729-30, or the Texas court's construction of the statute approved in Jurek and Lockett, see Granviel, 561 S.W.2d at 516.

Thus, the legal landscape facing Mr. Selvage's counsel when he tried the issue of punishment in February, 1980 was undifferentiated. The Supreme Court of the United States had twice held that the Texas statute permitted the kind of consideration of mitigating circumstances required by the Constitution, and the Texas Court of Criminal Appeals had three times held that the Supreme Court's analysis foreclosed any of a variety of challenges to the statute's arguable constriction of the proper consideration of mitigating circumstances. In contrast to the legal setting before the petitioner in Engle v. Isaac, where even though the state courts had repeatedly rejected the due process claim which petitioner failed to raise, "numerous [other] courts" had accepted the very same claim, 456 U.S. at 132-33, the legal setting offered absolutely no support for a Franklin-type challenge at the time Mr. Selvage was tried. As the Court has observed in a similar context, where its previous decisions have cut off known constitutional claims, "there will almost certainly be no reasonable basis upon which an attorney could have urged a state court to adopt [his or her] position...." Reed v. Ross, 468 U.S. at 17. To find no "cause" for failure to raise an issue in these circumstances, as the Fifth Circuit has done in Mr. Selvage's case, thus seems to ignore or eviscerate all the "cause" parameters which the Court has articulated over the eleven years since Sykes was decided.

Similarly, the Fifth Circuit has ignored the "fundamental miscarriage of justice" principles which seem plainly applicable to the use of the Sykes rule in this context. The only consideration the Fifth Circuit gave to this principle in Mr. Selvage's case was to note that the Franklin claims "presented

[the court] with no claim of factual innocence...." Appendix A, at 15. Of course, the concept of "'actual'... innocence" requires translation "into the context of an alleged error at the sentencing phase of a trial on a capital offense," Smith v. Murray, 91 L.Ed.2d at 446, but the Fifth Circuit did not undertake the translation. As translated, this concept requires constitutional error which "[]either precluded the development of true facts []or resulted in the admission of false ones," or which "served to pervert the jury's deliberations concerning the ultimate question[s]." Id. at 447. Both of the Lockett errors alleged by Mr. Selvage fell into these categories. Through its effect on defense counsel, the statute precluded the presentation of a psychiatric defense which, in turn, "precluded the development of [the] true facts" underlying Mr. Selvage's moral culpability. Through its exclusion of the proffered mitigating circumstances from the jury's consideration of the statutory questions, the statute "perverted" the jury's sentencing deliberations by preventing the consideration of mitigating circumstances in the determination of Mr. Selvage's sentence.

Accordingly, the Fifth Circuit's answers to both of the procedural default questions raised by Mr. Selvage's case are unsatisfactory. These questions, as much as the merits presented in Franklin, cry out for the Court's considered analysis.

II.

WHEN THE PROCEDURAL QUESTIONS ARE PUT ASIDE, MR. SELVAGE PRESENTS THE SAME ISSUE THAT IS BEFORE THE COURT IN FRANKLIN V. LYNAUGH.

The question before the Court in Franklin v. Lynaugh, No. 87-5546, is clearly drawn. The Texas statute in the typical case -- and Mr. Selvage's case is typical in this respect -- asks the jury to answer only two questions in order to determine the convicted defendant's sentence: whether the murder was committed deliberately, and whether there is a "probability" that the defendant will commit future criminal acts that would threaten society. If the mitigating evidence proffered by the defendant in a particular case can be considered as a mitigating factor in

answering these questions, the sentencing process in that case satisfies the Eighth Amendment's requirement that mitigating evidence "be permitted, as such, to affect the sentencing decision," Lockett v. Ohio, 438 U.S. a' 608. If the mitigating evidence is neither relevant to, nor capable of consideration as mitigating under, one of the statutory questions, however, that evidence is not permitted "as such" to affect the sentencing decision. In fact, if the jurors are true to their oaths, such mitigating evidence cannot affect their sentencing decision at all. The Court must decide in Franklin whether the Eighth Amendment demands resentencing in this latter kind of case under a procedure that permits appropriate consideration of mitigating circumstances.

Mr. Selvage's case is one in which the statutory questions did not permit independent mitigating weight to be given to the mitigating evidence proffered in his behalf. Mr. Selvage was shown to be a person of good character whose life was thrown into profound disarray by drug addiction: after a promising high school career, Mr. Selvage was drafted into the military where he developed an addiction to heroin, which continued to plague him long after his medical discharge from the military. This addiction apparently motivated the robbery which turned into the felony murder for which he was convicted and sentenced to death. This mitigating evidence did not rebut the notion that the crime was committed deliberately. Moreover, it did not call into question the probability that Mr. Selvage would continue to commit violent criminal acts that would pose a threat to society. If anything, the evidence suggested that he would continue to pose such a threat. Nevertheless, reasonable jurors could have believed that the mitigating evidence also called for a sentence less than death, because it was evidence of personal tragedy, not meanness of spirit -- evidence of the "frailt[y] of humankind," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), to which an appropriate response could be compassion, not retribution. Id.

But as in Franklin, even if Mr. Selvage's jurors concluded

that the mitigating evidence called for a life sentence, they had no procedural mechanism through which to express that conclusion. They could well have decided that the murder was committed deliberately and that there was a probability that Mr. Selvage would continue to commit violent criminal acts that would threaten others. Yet upon making these findings, the jurors were required to impose a sentence of death -- they were given no way to give effect to their view that the mitigating evidence "as such," called for a life sentence. If this defect violated the Eighth Amendment in Franklin's case, it also did in Mr. Selvage's case.

III.

EVEN IF THE COURT DECIDES IN FRANKLIN THAT THE TEXAS DEATH PENALTY STATUTE DOES NOT PRECLUDE THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AMENDMENT, A CONDEMNED TEXAS PRISONER SHOULD BE ALLOWED THE OPPORTUNITY TO SHOW THAT REASONABLY EFFECTIVE COUNSEL COULD NEVERTHELESS HAVE CONSTRUED THE STATUTE AS PRECLUDING THE CONSIDERATION OF SOME MITIGATING CIRCUMSTANCES, AND THAT BECAUSE HIS LAWYER HELD THIS VIEW, RELEVANT MITIGATING EVIDENCE WAS NOT INVESTIGATED OR PRESENTED ON HIS BEHALF, THEREBY DEPRIVING HIM OF THE ASSISTANCE OF COUNSEL AND OF AN INDIVIDUALIZED SENTENCING DETERMINATION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

John Selvage is psychotic and has suffered continually from these disorders since at least 1970. In 1979, when he participated in the robbery that led to the homicide herein, he was likely suffering the effects of psychosis.

Had Mr. Selvage's sentencing jury known about these disorders, they might have decided that he should not be sentenced to death. As Justice O'Connor has explained,

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable ... to emotional and mental problems, may be less culpable than defendants who have no such excuse.

California v. Brown, ___U.S.___, 93 L.Ed.2d 934, 942 (1987). See also Skipper v. South Carolina, ___U.S. ___, 90 L.Ed.2d 1, 12 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J.,

concurring)("[s]ociety's legitimate desire for retribution is less strong with respect to ... defendants who have reduced capacity for considered choice[;] ... [e]vidence concerning the defendant's ... emotional history thus bear[]s directly on the fundamental justice of imposing capital punishment"). However, the jury had no opportunity to weigh Mr. Selvage's culpability in light of his mental illness, because no evidence of his illness was presented at trial.

This evidence was not presented because trial counsel, in reasonable reliance upon the Texas death penalty statute's limitation, forewent substantial investigation, presentation and argument of this compelling mitigating evidence. They forewent those essential functions of defense counsel in a capital case because, in their view, Texas' capital sentencing scheme precluded consideration of Mr. Selvage's illness as mitigating evidence in the circumstances of his case. They believed that presentation of such evidence would have assisted the state in proving that there was a possibility that Mr. Selvage would be violent in the future. Further, they believed it could not prevent the jury from finding that the homicide was "deliberately" committed. Even though they believed that this evidence would have weighed heavily in favor of a life sentence, they believed that the jury would have had no means through which to give effect to the mitigating weight of the evidence, for upon giving the evidence aggravating weight -- which it would have been constrained to do -- the jury's "consideration" of this evidence would have mandated the death sentence.

The question presented is whether the constraint felt by Mr. Selvage's counsel, which affected their investigation and presentation of mitigating evidence, violated Mr. Williams' rights under the Constitution. We believe that it did for the following reasons:

(a) Counsel's belief that the Texas statute operated to preclude the jury's ability to consider mental illness as a mitigating circumstance was reasonable. Concededly, it was at

variance with the Court's view of the operation of the statute in Jurek v. Texas, 428 U.S. 262 (1976), and with the Texas Court of Criminal Appeals' view since Jurek. And it may be at variance with the Court's view of the operation of the statute when it decides Franklin. Nevertheless, if Mr. Selvage had challenged -- as "deficient performance" -- his counsel's failure to investigate and present his mental illness as a mitigating circumstance, counsel's explanation of why the evidence went uninvestigated and unpresented would have been deemed a reasonable strategic choice. It is generally reasonable to forego the presentation of evidence helpful to the defendant if it carries with it the risk of being more harmful than helpful. For these reasons, counsel such as Mr. Selvage's counsel cannot be deemed to have performed deficiently for having made the decision they made.

(b) At the same time, counsel's strategic choice was not dictated by their view of how the jury would weigh the evidence if the jury were unfettered in its consideration of the evidence. Rather, their view was dictated by their belief that the statutory "special issues" provided no mechanism through which the jury could consider the mitigating aspects of the evidence of mental illness. They stated quite clearly that if, in their view, the jury had been provided with such a mechanism, they could well have decided to present evidence of mental illness even though it might at the same time have assisted the state in establishing Mr. Selvage's future dangerousness. Accordingly, counsel's strategic choice not to investigate and present evidence of mental illness was the indirect product of the Texas statute -- or at least of their perception of the manner in which it operated to constrain the jury -- rather than the product of their weighing of the evidence.

(c) For these reasons, the Texas statute, rather than the unreasonableness of counsel or the nature of the mitigating evidence, operated to constrict counsel's investigation and presentation of evidence. The result was a violation of the

Sixth Amendment right to the effective assistance of counsel -- not as a result of counsel's deficient performance, but as a result of Texas' interference with counsel's performance. As the court explained in Strickland v. Washington, 466 U.S. 668, 686 (1984), "[g]overnment [as distinct from deficient performance by counsel] violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."

The question presented, therefore, is whether the Texas statute was reasonably susceptible to the reading given to it by Mr. Selvage's counsel, and if so, whether that susceptibility amounted to the kind of government interference "with the ability of counsel to make independent decisions about how to conduct the defense," that mandates relief, without any particular showing of prejudice, under Strickland.

This question was one aspect of the question upon which certiorari was granted in Hitchcock v. Wainwright, No. 85-6756. See Brief for Petitioner, at 23-35. When Hitchcock was decided, however, the Court did not reach this issue. See Hitchcock v. Dugger, ___U.S.___, 95 L.Ed.2d 347 (1987). In the light of the Court's already-manifested interest in this question, and in light of its importance in a state like Texas, where counsel may have suffered significant interference in their ability to represent their clients, the Court should take up this question again.

IV.

BAREFOOT V. ESTELLE REQUIRED A STAY OF EXECUTION AND PLENARY CONSIDERATION OF MR. SELVAGE'S VOIR DIRE CLAIM IN THE FIFTH CIRCUIT, GIVEN THE PENDENCY BEFORE THE EN BANC FIFTH CIRCUIT OF THE SAME CLAIM IN ANOTHER CASE, THE OUTCOME OF WHICH WOULD CONTROL THE DISPOSITION OF MR. SELVAGE'S APPEAL.

In Barefoot v. Estelle, 463 U.S. 880 (1983) the court set forth guidelines to assist the lower federal courts in determining when to grant stays of execution in capital cases and when to dispose of such cases summarily in the face of an impending execution. Id. at 892-96. In constructing these

guidelines, the Court sought to strike a balance between the state's desire for finality and the condemned person's right to be spared from execution if "questions of substance" remained to be resolved in his case. This balance was struck unjustly and incorrectly by the Fifth Circuit in Mr. Selvage's case. The resulting decision makes a mockery of the Barefoot Court's profound concern that the competing interests of both the state and the condemned be fairly taken into account in circumstances such as this.

In King v. Lynaugh, 828 F.2d 257 (5th Cir. 1987), the Fifth Circuit held that the refusal to allow a capital defendant to conduct a limited voir dire on whether jurors held misconceptions about Texas parole law violated the Eighth and Fourteenth Amendments. The King panel found that widely held misconceptions about the effect of imposing a life sentence raised an unacceptable risk that a jury might impose a sentence of death largely on the basis of mistaken notions of parole law:

> The significance of the information King sought to discover is clear. A juror might decline to impose the death penalty if the alternative were confinement of the criminal for life without possibility of parole because the general public would be adequately protected by such a life sentence. Similarly, a juror might decline to impose the death penalty on a particular defendant if he believed that the individual to be sentenced would no longer represent a menace if he were confined for at least twenty years without parole for the crime he committed. If, on the other hand, a juror believed it were likely -- or even possible -- that a convicted person would be released in a few years and the juror believed that the criminal would then still constitute a hazard to the public, that juror might conclude that only the death penalty would adequately ensure public safety.

828 F.2d at 260.

Although King broke new ground, it did so with tools this Court has provided. In California v. Ramos 463 U.S. 992 (1983), the Court sustained against constitutional challenge the state's practice of instructing jurors that sentences of life without parole could be commuted. Thereafter, in Caldwell v. Mississippi, 472 U.S. 320 (1985), Justice O'Connor explained that if the state chose to correct jurors' misunderstanding about pardon or parole or other post-conviction matters, the

Constitution required that the corrective information be accurate, because jurors often "harbor misconceptions" about such matters. 472 U.S. at 342 (O'Connor, J., concurring). In another area where jurors often harbor misconceptions -- when a homicide involves a defendant who is black and a victim who is white -- the Court has held that a defendant is entitled to voir dire prospective jurors on racial misconceptions and prejudices in order to reduce the risk that such misconceptions would influence the outcome of the capital sentencing proceeding. Turner v. Murray, 476 U.S. 1 (1986).

The King panel brought these two lines of "juror misconception" cases together, reasoning that if the Constitution requires the states who undertake to cure juror misconceptions about life sentences and parole to do so accurately, and if the Constitution requires the states to give defendants the chance during voir dire in a capital case to root out misconceptions based on race, the Constitution requires that the defendant be given the same opportunity during voir dire to root out misconceptions based on parole.

In light of the new ground broken by the King panel, and in light of a vigorous dissent arguing that the new ground was an unwarranted extension of Eighth and Fourteenth Amendment principles, the Fifth Circuit decided to rehear King en banc. King v. Lynaugh, 828 F.2d 269 (5th Cir. 1987). As of the time the instant pleading was filed, however, no opinion had issued from the en banc court in King.

Mr. Selvage presented to the District Court the very same issue addressed in King. Since the state courts chose to address the merits of the King issue in his case, the District Court found there was no procedural default which might bar review of the merits in federal habeas proceedings. Further, the District Court found no abuse of the writ.[3] For these reasons, the District Court determined that the en banc decision in King would

---

[3] The Fifth Circuit agreed with these findings. See Appendix A, at 6.

control the resolution of the same issue in Mr. Selvage's case, that adjudication of the King issue should be withheld pending the en banc decision in King, and that Mr. Selvage's execution should be stayed until King was decided and could be applied in his case.

In these circumstances, Barefoot plainly called for the very action taken by the District Court. Manifestly, a "question of substance" was presented by Mr. Selvage, and the state's quest for finality had to be given secondary importance in the balance called for by Barefoot. Nevertheless, the Fifth Circuit entertained and granted a motion thereafter by the state to dissolve the District Court's stay of execution. The basis for the Fifth Circuit's action demands the corrective intervention of this Court.

The Fifth Circuit panel in Mr. Selvage's case justified its action by deciding the merits of Mr. Selvage's claim. The crucial factor, in its view, was that the trial court instructed the prospective jurors to give no consideration to parole considerations. Such an instruction "cured" any misconceptions the jurors might have had about the length of life sentences by requiring such misconceptions to be set aside. Appendix A, at 7.

In deciding that Mr. Selvage's claim was insubstantial for this reason, the panel put itself in direct conflict with the King panel, which had expressly rejected this rationale:

> The state contends that, by instructing the jury that parole 'is no concern of yours' and is not to be considered, the court benefitted King by essentially telling the jury that 'life means life.' If a misconception exists, no instruction that merely directs jurors to disregard issues of parole in making their sentencing determination can erase that fallacy from their minds. That voir dire could easily minimize the risk to the accused created by this misconception strengthens King's claim to constitutional protection from the potential ramifications of failing to strike a juror who harbors a mistaken belief.

828 F.2d at 260.

It does not matter at this point which of these conflicting panel views should ultimately prevail. What does matter profoundly is that the King panel's views have already been taken

up by the en banc Fifth Circuit for rehearing. Surely during the pendency of a rehearing en banc, another panel of the circuit cannot be allowed to decide anew the issue already pending before the en banc court. Such a process, in light of Barefoot, elevates the state's interest in finality over the most fundamental notions of orderly judicial processes and due process.

The Court should not tolerate such a radical inversion of the values it sought so carefully to hold in balance in Barefoot.

CONCLUSION

For these reasons, the Court should grant Mr. Selvage's petition for writ of certiorari and stay his execution.

March 29, 1988

Respectfully submitted,

DAVID CUNNINGHAM
Texas Bar No. 05234400
1927 Norfolk
Houston, Texas 77098
(713) 520-7701

JULIUS L. CHAMBERS
* RICHARD H. BURR, III
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-1900

GEORGE KENDALL
31 Elm Street, Ste. 236
Springfield, MA 01103
(413) 781-1405

By: Richard H. Burr III

ATTORNEYS FOR PETITIONER

* Counsel of Record

MAR 29 '88 11:49 FROM NAACP LEGAL DEFENSE PAGE.002

No. 87 - _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN HENRY SELVAGE,
Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner JOHN HENRY SELVAGE, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. An affidavit of indigency will follow.

Dated: March 29, 1988

Respectfully submitted,

DAVID CUNNINGHAM
Texas Bar No. 05234400
1927 Norfolk
Houston, Texas 77098
(713) 520-7701

JULIUS L. CHAMBERS
RICHARD H. BURR, III
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-1900

GEORGE KENDALL
31 Elm Street, Ste. 236
Springfield, MA 01103
(413) 781-1405

ATTORNEYS FOR PETITIONER
By: Richard H. Burr III

MAR 29 '88 1:24 FROM NAACP LEGAL DEFENSE PAGE.004

Supreme Court, U.S.
FILED
MAY 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

NO. 87-6700

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

LOU MCCREARY
First Assistant
Attorney General

MARY F. KELLER
Executive Assistant
Attorney General for Litigation

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

ROBERT S. WALT*
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

*Counsel of Record

QUESTIONS PRESENTED

I. Whether procedural default on a Franklin v. Lynaugh claim can be found without first examining the complete record of judicial responses to such a claim at the time it could have been timely raised, and without examining whether the need to avoid a "fundamental miscarriage of justice" calls for avoidance of the procedural default rule?

II. Whether a condemned Texas prisoner who presents the same issue that is before the Court in Franklin v. Lynaugh must have his execution stayed pending the decision in Franklin.

III. Even if the Court decides in Franklin v. Lynaugh that the Texas death penalty statute does not preclude the jury's consideration of mitigating circumstances in violation of the Eighth Amendment, whether a condemned Texas prisoner must be given the opportunity to show that reasonably effective counsel could nevertheless have construed the statute as precluding the consideration of some mitigating circumstances, and that, because his lawyer held this view, relevant mitigating evidence was not investigated or presented on his behalf, thereby depriving him of the assistance of counsel and of an individualized sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments?

IV. Whether the pendency before the en banc Fifth Circuit in another case of the very same issue raised by petitioner requires that petitioner's case be held for the en banc decision and precludes the panel before whom petitioner's case is heard from deciding the merits of that issue itself?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	4
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE WRIT	5
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.	5
II. THE TEXAS CAPITAL SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.	6
A. Consideration of Selvage's claim is barred by his failure to object on this basis at the time of trial.	7
B. Selvage is not entitled to relief on the ground that the Texas capital sentencing statutes is unconstitutional.	9
III. THE EIGHTH AND FOURTEENTH AMENDMENTS DO NOT ENTITLE A CAPITAL MURDER DEFENDANT TO QUESTION PROSPECTIVE JURORS CONCERNING PAROLE ELIGIBILITY REQURIEMENTS, WHEN ANY CONSIDERATION OF PAROLE IS PRECLUDED BY LAW AND THE JURY IS INSTRUCTED ACCORDINGLY.	18
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
Adams v. Texas, 448 U.S. 38 (1980).	16
Barclay v. Florida, 463 U.S. 939 (1981)	14
Barefoot v. Estelle, 463 U.S. 880 (1983).	6,12,23
Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529 (1986).	9
Buchanan v. Kentucky, ___ U.S. ___, 107 S.Ct. 2906 (1987).	15
Burger v. Kemp, ___ U.S. ___, 107 S.Ct. 3110 (1987) . .	15
California v. Brown, ___ U.S. ___, 107 S.Ct. 837 (1987)	9,15,21
California v. Ramos, 463 U.S. 992 (1983).	20,21
Cass v. State, 676 S.W.2d 589 (Tex. Crim. App. 1984)	12
Eddings v. Oklahoma, 455 U.S. 104 (1982).	6,10,14
Engle v. Isaac, 456 U.S. 107 (1982)	6,7
Enmund v. Florida, 458 U.S. 782 (1982).	10
Franklin v. Lynaugh, 823 F.2d 98 (5th Cir.), cert. granted, ___ U.S. ___, 108 S.Ct. 221 (1987)	6
Furman v. Georgia, 408 U.S. 238 (1972).	15,17
Green v. State, 682 S.W.2d 271 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985)	12
Gregg v. Georgia, 428 U.S. 153 (1976)	15,17
Ham v. South Carolina, 409 U.S. 524 (1973).	18
Heckert v. State, 612 S.W.2d 549 (Tex. Crim. App. 1981)	12
Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987).	10
Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975)	13
Jurek v. Texas, 428 U.S. 262 (1976)	8,15
King v. Lynaugh, 828 F.2d 257 (5th Cir.), reh. en banc granted, 828 F.2d 269 (5th Cir. 1987).	4,23
Lockett v. Ohio, 438 U.S. 586 (1978).	passim
Lowenfield v. Phelps, ___ U.S. ___, 108 S.Ct. 546 (1988)	15

TABLE OF AUTHORITIES (cont'd.)

Cases	Page
Meanes v. State, 668 S.W.2d 366 (Tex. Crim. App. 1983), cert. denied, 466 U.S. 945 (1984).	12
Munroe v. State, 637 S.W.2d 475 (Tex. Crim. App. 1982)	21
Murray v. Carrier, 477 U.S. ___, 106 S.Ct. 2639 (1986).	7
Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App.), cert. denied, 449 U.S. 893 (1980).	8
Ristaino v. Ross, 424 U.S. 589 (1976)	18
Robinson v. State, 548 S.W.2d 63 (Tex. Crim. App. 1977)	12
Rosales-Lopez v. United States, 451 U.S. 182 (1981) . .	18,19,22
Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986).	10,11
Smith v. Murray, ___ U.S. ___, 106 S.Ct. 2661 (1986). .	8,9
Strickland v. Washington, 466 U.S. 668 (1984)	22
Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716 (1987) .	11,13
Tison v. Arizona, ___ U.S. ___, 107 S.Ct. 1676 (1987) .	10
Turner v. Murray, 476 U.S. 1 (1986)	19,20
Wainwright v. Sykes, 433 U.S. 72 (1977)	7
Constitutions, Statutes and Rules	
U.S. Const. amend. VI	2
U.S. Const. amend. VIII	2,18
U.S. Const. amend. XIV.	2,18
28 U.S.C. § 1257(3)	2
Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1988).	2,6,13
Fed. R. Civ. P. 60(b)	3
Rule 17, Rules of the Supreme Court	5
Rule 41.3, Local Rules of the Fifth Circuit	23

NO. 87-6700

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent herein,[1] by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying Selvage relief and vacating a stay of execution is not yet published, Selvage v. Lynaugh, ___ F.2d ___, No.87-2285, slip op. 2790 (5th Cir. March 28, 1988), is attached as Appendix A to the petition for writ of certiorari. The opinion of the United States District Court for the Southern District of Texas denying Selvage habeas relief but granting a stay of execution is not published and is attached as Appendix B to the petition for writ of certiorari.

[1] For clarity, Petitioner is herein referred to as "Selvage" and Respondent as "the state."

JURISDICTION

Selvage seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Selvage bases his claims upon the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful custody of Selvage pursuant to a judgment and sentence of the 230th Judicial District Court of Harris County, Texas, in Cause No. 305495, styled The State of Texas v. John Henry Selvage. On December 4, 1979, Selvage was indicted in a two-paragraph indictment for the offense of capital murder of Albert Garza, while in the course of committing and attempting to commit the offense of robbery of Stephen Ventura, and for the offense of capital murder of Albert Garza, a peace officer known by Selvage to be acting in the lawful discharge of an official duty, to which Selvage entered a plea of not guilty.

Trial began on February 4, 1980, and on February 8, 1980, the jury found Selvage guilty of the capital offense. On February 11, 1980, after a punishment hearing, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1988). Accordingly, punishment was assessed at death. Selvage appealed to the Texas Court of Criminal Appeals, which affirmed on July 11, 1984, Selvage v. State, 680 S.W.2d 17 (Tex. Crim. App. 1984), and denied rehearing on October 10, 1984. Selvage did not seek certiorari review.

The trial court subsequently scheduled Selvage's execution for November 14, 1985. Without seeking state habeas corpus relief, Selvage filed an application for writ of habeas corpus

and an application for stay of execution in the United States District Court for the Southern District of Texas, Houston Division, which granted the requested stay on November 8, 1985. On January 26, 1986, Selvage filed his amended petition for writ of habeas corpus, which was denied by the court on October 6, 1986. Notice of appeal was not timely filed. However, on March 4, 1986, the district court vacated its earlier judgment pursuant to Fed.R.Civ.P. 60(b), but readopted its previous memorandum and order denying habeas corpus relief. Selvage v. Lynaugh, No. H-85-6253 (S.D. Tex. March 4, 1986). Selvage appealed the district court's judgment, and the United States Court of Appeals for the Fifth Circuit affirmed on July 23, 1987. Selvage v. Lynaugh, 823 F.2d 845 (5th Cir. 1987). A petition for writ of certiorari was subsequently denied by this Court on November 2, 1987. Selvage v. Lynaugh, ___ U.S. ___, 108 S.Ct. 309 (1987).

While his Rule 60(b) motion was pending in the district court, Selvage filed his first state habeas corpus application in the state convicting court on March 3, 1987. The application was subsequently denied by the Texas Court of Criminal Appeals. Ex parte Selvage, No 16,884-01 (Tex. Crim. App. March 6, 1987).

On December 10, 1987, the trial court rescheduled Selvage's execution for January 27, 1988. On January 21, 1988, Selvage filed his second state habeas corpus application in the trial court. On January 25, 1988, the trial court modified Selvage's death warrant and rescheduled his execution for March 30, 1988. On March 14, 1988, the trial court entered findings of fact and conclusions of law, recommended denial of the writ and forwarded the application to the Court of Criminal Appeals, which adopted the trial court's findings in denying the writ. Ex parte Selvage, No. 16,884-02 (Tex. Crim. App. Mar. 21, 1988).

On January 22, 1988, while his state habeas application was pending, Selvage filed his second application for federal writ of habeas corpus and an application for stay of execution in the district court below. After Selvage had exhausted his state remedies, the district court denied habeas relief on all of

Selvage's claims except his claim relating to the trial court's refusal to allow voir dire examination of prospective jurors on parole considerations. The district court granted a stay of execution based upon this latter issue and held judgment on that issue in abeyance pending the Fifth Circuit's en banc reconsideration of King v. Lynaugh, 828 F.2d 257 (5th Cir.), reh. en banc granted, 828 F.2d 269 (5th Cir. 1987). Selvage v. Lynaugh, No. H-88-0166 (S.D. Tex. March 25, 1988).

The state immediately appealed the district court's granting of a stay of execution and Selvage appealed the district court's denial of habeas relief on the remaining issues. The court of appeals subsequently vacated the stay of execution, denied Selvage a certificate of probable cause to appeal and denied a stay of execution on the remaining issues. Selvage v. Lynaugh, ___ F.2d ___, slip op. 2790 (5th Cir. March 28, 1988). However, on March 29, 1988, this Court ordered Selvage's execution stayed pending resolution of the instant petition. Selvage v. Lynaugh, ___ U.S. ___, 108 S.Ct. 1283 (1988).

B. Statement of Facts

The facts surrounding Selvage's commission of capital murder are accurately set forth in the opinion of the Court of Criminal Appeals, Selvage v. State, 680 S.W.2d at 18-19, and the opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of Selvage's first federal habeas corpus application. Selvage v. Lynaugh, 823 F.2d at 846-47.

SUMMARY OF THE ARGUMENT

There is no special or important reason for this Court to exercise its certiorari jurisdiction. The court below applied correct principles of constitutional and procedural law in rejecting Selvage's claims.

The court of appeals below correctly held review of Selvage's Franklin claims to be barred under the procedural default doctrine. Trial counsel had actual knowledge of the existence of the claim at the time of trial, yet failed to object on that basis. Because the Franklin claim was available at the

time of trial, and there is no manifest injustice in applying a procedural bar, the refusal to review the merits of the claims was proper.

Even were review of the merits of Selvage's Franklin claims proper, he is not entitled to relief. The Texas capital sentencing procedures allow for the presentation and consideration of all relevant mitigating evidence regarding a defendant's crime and character. Selvage points to no evidence that is precluded from consideration by a Texas jury, and his complaint that the jury cannot give effective consideration to the mitigating evidence amounts to nothing more than Selvage's disagreement with his jury's verdict. To adopt Selvage's argument would constitutionally mandate that a jury be merciful, and such an action would constitute a return to unguided, unreviewable sentencing decisions, and thus the arbitrary and capricious imposition of death sentences condemned in Furman v. Georgia.

The court of appeals below, applying established constitutional precedent of this Court, properly concluded that voir dire examination of prospective jurors on parole considerations is not constitutionally mandated. Selvage fails to demonstrate a constitutionally unjustifiable risk of bias that would give rise to such a right. Moreover, the decision by the court of appeals below to deny a certificate of probable cause and a stay of execution on this issue represents a proper application of this Court's holding in Barefoot v. Estelle.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Selvage has advanced no special or important reason in this case, and none exists. This case involves the proper application of settled principles of

constitutional and procedural law to Selvage's particular factual circumstances. The court below properly applied the procedural default doctrine, see Engle v. Isaac, 456 U.S. 107 (1982), in rejecting Selvage's Franklin claims. See Franklin v. Lynaugh, 823 F.2d 98 (5th Cir.), cert. granted, ___ U.S. ___, 108 S.Ct. 221 (1987). Moreover, the court below properly applied established precedent of this Court in rejecting Selvage's claim relating to voir dire examination of jurors on parole considerations, and his claim that a prior panel decision of the Fifth Circuit, which had been vacated by that court, mandated a stay of execution finds no support in Barefoot v. Estelle, 463 U.S. 880 (1983).

II.

THE TEXAS CAPITAL SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.

In his first three interrelated claims, Selvage argues that the Texas capital sentencing statute precludes jury consideration of relevant mitigating evidence that might serve as a basis for a sentence less than death. He contends that because the jury is limited to answering the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1988), and because the state does not require an instruction on how to consider mitigating evidence, the jury could fail to see the relevance of some evidence that might persuade it to not impose the death penalty. Thus, the evidence would not be taken into consideration during punishment deliberations, in violation of the holdings of Lockett v. Ohio, 438 U.S. 536 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982), and their progeny. Selvage further contends that trial counsel, perceiving the flaw in the Texas statute, reasonably forewent investigation and, thus, did not present evidence of Selvage's mental condition in mitigation of punishment. He relies on the granting of the petition for writ of certiorari in Franklin v. Lynaugh, ___ U.S. ___, 108 S.Ct. 221 (1987), to support his contentions.

A. Consideration of Selvage's claim is barred by his failure to object on this basis at the time of trial.

Prior to trial, Selvage filed a motion to have the Texas capital sentencing statute declared unconstitutional on the basis that it violated his right to be free from cruel and unusual punishment, and was vague and indefinite so as to violate his rights to due process. Selvage did not object to the court's charge at the punishment phase of trial and did not submit a proposed instruction on mitigating evidence or otherwise object to the capital sentencing statute on the grounds now urged. When he presented these claims in his application for state writ of habeas corpus, the state courts noted that his current claims did not comport to his objection to the validity of the statute voiced at trial and, consequently, the courts imposed their contemporaneous objection rule and held that review of the merits of the claims were barred. Ex parte Selvage, No. 16,884-02 (March 21, 1988).

When a defendant fails to follow a state procedural rule and review of a claim of error is refused by state courts, federal habeas review of the claim is barred, unless he can demonstrate cause for his failure and resulting prejudice. Murray v. Carrier, 477 U.S. ___, ___, 106 S.Ct. 2639, 2648 (1986); Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Selvage has demonstrated no cause for his failure to timely object on the grounds now raised, nor has he alleged any prejudice. Accordingly, the Fifth Circuit held review of his Franklin claims to be procedurally barred.

Selvage faults the Fifth Circuit's respect of the state procedural bar for two reasons. First, he contends that the Franklin issue was not reasonably available to counsel at the time of trial, and therefore its "novelty" excuses Selvage's procedural default. This argument ignores both the facts of Selvage's case and the state of the law, both federal and state, at the time of trial. In support of his Franklin claims, Selvage submitted an affidavit of his trial counsel, wherein counsel

stated that he was aware before Selvage's trial of a flaw in the Texas scheme that supposedly prevented a jury from properly considering mitigating evidence. Selvage must be held to vouch for the veracity of his proffered evidence, and, therefore, cannot claim that counsel was unaware of either the factual or legal bases for an objection.

Moreover, as pointed out by the Fifth Circuit, the law at the time of trial was far from certain. While this Court had, in light of the Court of Criminal Appeals' interpretation of the second special punishment issue, affirmed the facial validity of the Texas capital sentencing scheme in Jurek v. Texas, 428 U.S. 262 (1976), it left open the question of the constitutional validity of its application, leaving the interpretation of the statute to the state courts. This view of the Texas statute was again noted in Lockett v. Ohio, 438 U.S. 586 (1978). In Lockett, however, the Court did not address the constitutional effect of subsequent interpretation of the Texas statute by Texas courts regarding the procedures for jury consideration of mitigating evidence. As correctly noted by the Fifth Circuit, the first time the Franklin claim was before this Court, and indeed the first time it was squarely presented to the Court of Criminal Appeals, was in Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App.), cert. denied, 449 U.S. 893 (1980). Quinones was decided approximately one month before Selvage's trial, and trial counsel is chargeable with knowledge of that fact and, consequently, the existence of a ground for objection at the time of trial. Moreover, the constitutional validity of the Texas procedure challenged by Selvage and Franklin was far from settled at the time of Selvage's trial, given the fact that the question had never been presented to this Court. Hence, the Franklin claim was clearly "available" at the time of trial, and thus a failure to object cannot be excused on novelty grounds. Smith v. Murray, ___ U.S. ___, ___, 106 S.Ct.2661, 2667-68 (1986).

Selvage next urges that his procedural default should be excused because it would result in a fundamental miscarriage of

justice. However, Selvage does not point to any false or misleading testimony which resulted in either his conviction or death sentence. Selvage's counsel's decision to not present psychiatric testimony was a sound tactical decision to avoid state psychiatric testimony in rebuttal. Moreover, counsel presented evidence of Selvage's personality change, drug addiction and availability of treatment without risking rebuttal by the state. See footnote 6, infra. Hence, the sentencing decision in Selvage's case was not perverted such that a fundamental miscarriage of justice occurred. Smith v. Murray, ___ U.S. at ___, 106 S.Ct. at 2668-69. Thus, because Selvage cannot demonstrate adequate cause for his procedural default, his Franklin claims were properly rejected by the court below without addressing their merits.

B. Selvage is not entitled to relief on the ground that the Texas capital sentencing statute is unconstitutional.

Even if the Court were to address the merits of Selvage's claim, he is not entitled to relief. The determination of what factors are relevant to a sentencing decision is a legislative matter, to which the courts normally will defer. Booth v. Maryland, ___ U.S. ___, ___, 107 S.Ct. 2529, 2532 (1987); Lockett v. Ohio, 438 U.S. 586, 604 (1978). Nevertheless, the Constitution does impose certain requirements on the factors a capital-murder jury may consider in making its punishment decision. To pass constitutional scrutiny, a state's capital sentencing procedure must allow for individualized sentencing. California v. Brown, ___ U.S. ___, ___, 107 S.Ct. 837, 839 (1987). This is accomplished by permitting the defendant to introduce and the sentencing authority to consider, as a mitigating factor, any evidence relevant to "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id.; Lockett v. Ohio, 438 U.S. at 604.

In those instances where the Court has identified specific kinds of evidence as being relevant to the sentencing

considerations, the evidence has had some bearing on the defendant's personal responsibility and moral guilt for his crime, or on those aspects of his character indicative of whether he will constitute a future threat. For example, in Lockett, the Court referred to evidence of the defendant's character, prior record, age, lack of specific intent to cause death, and the relatively minor part the defendant played in the crime as evidence that was relevant to the sentencer's decision but that was excluded from its consideration. 438 U.S. at 597.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court held that the trial and appellate courts' refusal to consider evidence of the defendant's age, difficult family history, and emotional disturbance in deciding whether the death penalty was appropriate was error because that evidence was relevant to the sentencing decision. Id. at 115; see also Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987). The Eddings Court emphasized that the relevance of such evidence lay in the fact that it indicated a lack of maturity and diminished the defendant's responsibility for his actions. Eddings, 455 U.S. at 116.

In another case decided the same term, the Court held that the death penalty could not constitutionally be imposed on one who did not himself kill, attempt to kill, or intend that lethal force be used. Enmund v. Florida, 458 U.S. 782 (1982). The Court did not expressly refer to the defendant's degree of personal participation in the crime as mitigating evidence. It did note, however, that the defendant's intent--and therefore his moral guilt--is critical to the degree of his criminal culpability, and reiterated that his personal culpability is a component of the individualized consideration mandated by the Eighth Amendment. Id. at 800; see also Tison v. Arizona, ___ U.S. ___, 107 S.Ct. 1676 (1987).

More recently, in Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986), the Court recognized that a capital-murder defendant's adjustment to prison life was relevant mitigating evidence that the sentencer could not be precluded from

considering. The inferences that could be drawn from such evidence "would not relate specifically to [the defendant's] culpability for the crime he committed, . . . [but] there is no question that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" Id. at ___, 106 S.Ct. at 1671. The opinion went on to stress that the evidence was relevant to whether the defendant would pose a future threat if he were not executed. Id. at ___, 106 S.Ct. at 1671-73.

In Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716 (1987), the Court invalidated a statute that provided for a mandatory death sentence for a prison inmate who committed murder while serving a life sentence without possibility of parole. The constitutional defect in the statute was its failure to allow the sentencer to consider such factors as the defendant's degree of participation in the crime, his prior record, youth, the influence of alcohol, drugs, and extreme emotional disturbance, circumstances that the defendant reasonably believed provided a moral justification for his conduct, and his behavior while in prison. Id. at ___, 107 S.Ct. at 2725-26.

The Texas statute clearly permits a defendant to introduce any relevant mitigating evidence that he wants the jury to consider in making its punishment decision. The statute does not contain a list of defined mitigating factors, as did the Ohio statute in Lockett and the Florida statute in Hitchcock, both of which were held to preclude introduction and consideration of certain mitigating evidence. Instead, under the Texas scheme, any evidence relating to the defendant's character or to any of the circumstances of the offense can be put before the jury.[2]

---

[2]In briefing and argument before the Court in Franklin, it was claimed that the Court's holding in Jurek was premised on a promise by the Texas Court of Criminal Appeals to interpret its statute liberally to allow the introduction of all relevant mitigating evidence, and that the Texas court had failed to fulfill its promise. Neither Selvage nor Franklin points to any
(Footnote Continued)

Furthermore, the special issues allow for jury consideration of the proffered evidence. The first special issue asks the jury to determine whether the defendant acted deliberately and with the reasonable expectation that the death of the victim or another would result. This question asks the jury to determine more than whether the defendant acted with the requisite criminal intent, Heckert v. State, 612 S.W.2d 549 (Tex. Crim. App. 1981), and focuses attention on his personal responsibility and moral guilt. See Green v. State, 682 S.W.2d 271 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985); Meanes v. State, 668 S.W.2d 366 (Tex. Crim. App. 1983), cert. denied, 466 U.S. 945 (1984). Evidence about the circumstances surrounding the murder is relevant to determining the answer to this issue, as are the defendant's degree of involvement in the crime, his age, emotional and mental development, and any history of substance abuse. For example, Selvage introduced evidence of his drug addiction as mitigating evidence. In addition, the jury can readily grasp the significance of such evidence to the first special issue, and the defendant can enhance the jury's perception of the evidence by introducing expert testimony and by jury argument.

Likewise, the second special issue concerns whether there is a probability that the defendant will commit future acts of violence that would constitute a continuing threat to society.[3]

(Footnote Continued)
case where the exclusion of relevant mitigating evidence was upheld by the Court of Criminal Appeals. To the contrary, that court consistently reverses cases where such evidence is excluded. Cass v. State, 676 S.W.2d 589 (Tex. Crim. App. 1984); Robinson v. State, 548 S.W.2d 63 (Tex. Crim. App. 1977).

[3]In Barefoot v. Estelle, 463 U.S. 880 (1983), the Court expressly held that the future dangerousness of a convicted capital murderer was a constitutionally valid sentencing consideration. Without restricting the evidence to be admitted on the second special issue, the Court of Criminal Appeals listed evidence which a jury typically could consider in answering the special issue: whether the defendant had a significant criminal record; the range and severity of his prior criminal conduct; the age of the defendant; whether or not at the time of the offense he was acting under duress or under the domination of another; and whether the defendant was under an extreme form of mental or emotional pressure, "something less, perhaps, than insanity, but
(Footnote Continued)

Evidence of the defendant's age, past behavior, upbringing, mental and emotional development, and prospects for rehabilitation is relevant to the jury's consideration of this issue. Again, Selvage offered much of this kind of evidence in mitigation at his trial. Selvage again points to no evidence he was precluded from offering, nor does he demonstrate that state case law since Jurek has restricted a defendant's ability to present or a jury's ability to consider mitigating evidence on this special issue The fact that the jury was not persuaded by Selvage's evidence indicates only that it ascribed less weight to the evidence than he does, not that the evidence was excluded from consideration.[4]

This, in fact, is the basis of Selvage's argument. He is simply dissatisfied because, although he was able to present all of the relevant mitigating evidence he had available and the jury was able to consider it, the jury did not find the evidence sufficient to justify answering either of the special issues negatively. Because the evidence did not have the decisive effect on the jury that it has on himself, Selvage contends that the evidence could not have been fully considered because of the structure of the statute.[5] However, the Court has recognized

(Footnote Continued)
more than the emotions of the average man, however inflamed, could withstand." Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975).

[4]Selvage, like Franklin, does not appear to quarrel with Texas' third special issue on punishment, whether, if raised by the evidence, the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Tex.Code Crim.Proc.Ann. art. 37.071(b)(3) (Vernon Supp. 1988). This issue clearly allows a defendant, at the very least, to present mitigating evidence that he "reasonably believed provided a moral justification for his conduct." Sumner v. Shuman, ___ U.S. at ___, 107 S.Ct. at 2725.

[5]Selvage's conclusion does not follow from the premise, and fully demonstrates the illogical nature of his, and Franklin's, argument. The argument -- "my mitigating evidence is sufficient in my mind to warrant a sentence less than death; I presented my evidence to the jury, but it returned a death sentence; therefore, the Texas statute does not allow for full consideration of mitigating evidence by the jury" -- would make even the most dedicated sophist blush.

that it is the sentencer's function to determine the weight that should be given to the evidence before it. Eddings, 455 U.S. at 114-15 ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence."); Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (Stevens, J., concurring) (neither Lockett nor Eddings held that any particular weight must be given by the sentencer to mitigating evidence). The fact that a capital murder defendant disagrees with the conclusion reached by the jury does not mean that the jury was precluded from considering, or failed to consider, all of the evidence he introduced.

Further, Selvage's claim that potentially mitigating evidence of his alleged psychosis was withheld because it could have been used as, or rebutted by, evidence to support imposing a death sentence is unavailing. The Constitution does not require that evidence introduced in a capital-sentencing hearing be exclusively mitigating or aggravating. That both the state and the defendant might be able to use the same evidence to support opposing contentions does not offend the Constitution, as long as the jury is not precluded from considering the mitigating aspects of the evidence. Evidence relating to punishment is circumstantial, and, like any circumstantial evidence, it is susceptible of more than one interpretation. It is for the sentencer to determine what weight each aspect of the evidence receives. Selvage has failed to identify any relevant mitigating evidence that the jury is precluded from considering under the Texas statute.

Selvage's argument appears to be that the defendant must be given the exclusive right to determine what evidence is mitigating and what is aggravating; once he designates certain evidence as mitigating, the state would be precluded from rebutting it. This Court has never devised a rule that removes the adversary process from any aspect of a capital murder trial, nor should it. Factors such as cross-examination, the state's bearing the burden of proof beyond a reasonable doubt, and the weighing of evidence by a jury drawn from a fair cross-section of the community are

fundamental components of the system that has been shown to be the greatest truth-finding process known to man. Removing adversarial testing of evidence from the penalty phase of a capital murder trial can hardly promote the rational and even-handed imposition of the death penalty, nor would it insure the enhanced reliability of such sentencing determinations.[6]

Selvage's claim ultimately appears to be that a capital sentencing statute, as a constitutional matter, must allow the jury to dispense mercy, even though it finds that the evidence warrants the death penalty. The Court has recognized that the occasional granting of mercy to a defendant does not violate the Constitution. Gregg v. Georgia, 428 U.S. 153, 199 (1976). The Court has also approved the Texas statute while noting that the death penalty is mandatory if the jury answers all of the special issues affirmatively. Jurek v. Texas, 428 U.S. at 278 (White, J., concurring); see also Lowenfield v. Phelps, ___ U.S. ___, ___, 108 S.Ct. 546, 554 (1988). Further, in California v. Brown, ___ U.S. at ___, 107 S.Ct. at 840, the Court expressly held that there is no constitutional violation in giving an instruction that tells the jury it is not to be swayed by mere sentiment or

---

[6]From the above, it is clear that Selvage's claim that the operation of the Texas capital sentencing procedures rendered trial counsel ineffective must fail. In two affidavits, counsel stated that, in his opinion, had the defense presented psychiatric testimony in mitigation of punishment, the state would have rebutted such evidence with its own psychiatric evidence, which would have effectively converted the defense's "mitigating" evidence into "aggravating" evidence. Because counsel, through his observations and his conversations with Selvage and his family did not perceive the existence of any mental problems, counsel forewent further investigation into this area. Counsel elected, however, to present evidence of Selvage's drug addiction and changed personality through the testimony of his sister and to present testimony of the availability of drug rehabilitation in prison through the testimony of a prison doctor, all without risking rebuttal by the state. That the state was free to rebut any psychiatric evidence offered during punishment is apparent. Buchanan v. Kentucky, ___ U.S. ___, 107 S.Ct. 2906 (1987). Ultimately, therefore, the only question to be resolved is whether counsel's decision was reasonable, and Selvage does not fault counsel for declining to further investigate, nor can he. Counsel's decision was reasonable under the circumstances of this case. Burger v. Kemp, ___ U.S. ___, 107 S.Ct. 3110 (1987).

sympathy in making its capital-sentencing decision. Such factors should not "play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor."[7]

To adopt Selvage's argument would remove all rationality from the Texas capital-sentencing procedure and would allow juries to base their verdicts on emotion rather than evidence. Such a result would effectively constitute a return to the arbitrary and capricious imposition of the death penalty. In Furman v. Georgia, 408 U.S. 238 (1972), the Court held that, as then applied, capital punishment was unconstitutional. Because juries were being given no guidance in making their sentencing decisions, the death penalty was being imposed in a wanton and freakish manner. Id., at 310 (Stewart, J., concurring). Responding to Furman, Texas crafted a statute that channels the jury's discretion by requiring it to answer questions about the defendant's personal responsibility and moral guilt for his crime, and about the likelihood that he will be a threat to society in the future. The trial court instructs the jury to consider all of the evidence presented at trial in making its decision and reminds it that the state bears the burden of proof beyond a reasonable doubt. Selvage would undermine all of these safeguards that insure that death sentences in Texas represent a reasoned response to the evidence by requiring the jury to consider whether the defendant should be spared as an act of mercy. Were the Court to adopt Selvage's argument, the state's

---

[7]In an anologous situation, the Court invalidated the state's exclusion for cause of prospective jurors whose verdicts would be "affected" by the possibility of a death sentence because the jurors' responses were likely to be expressions of the seriousness or gravity with which they invest their deliberations, their emotional involvement or that the prospects of the death penalty "may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." Adams v. Texas, 448 U.S. 38, 49-50 (1980). Similarly, feelings of mercy or sympathy related to an aspect of a defendant's crime or character may be expressed by the manner whereby a juror ascribes weight to a defendant's mitigating evidence or whereby he determines what constitutes a reasonable doubt. Texas jurors can thus effectively consider any mitigating evidence a defendant chooses to present.

efforts to guide the jury's discretion will be rendered a nullity, and the jury's answers to the special issues would be meaningless. After focusing on the defendant before it and on the factors relevant to the sentencing determination, the jury would have to be asked to ignore the evidence and to abandon rationality and simply decide, on the basis of emotion and whim, whether the defendant should be sentenced to death or to life imprisonment. As Justice White recognized in his concurrence in Lockett, "[b]y requiring as a matter of constitutional law that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances, the Court permits them to refuse to impose the death penalty no matter what the circumstances of the crime." 438 U.S. at 623. The irrationality of such an approach is even more egregious when the determinative factor in the sentencer's decision is not some mitigating aspect of the defendant's crime or character, but whether it should be merciful.[8]

If Selvage's argument is accepted, it no longer will be possible to distinguish "the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. at 313 (White, J., concurring). Appellate review, one of the elements of capital sentencing procedures that the Court has hailed in the past, Gregg v. Georgia, 428 U.S. at 198, would be impossible. To hold the consideration of mercy to be a constitutional requirement, the Court will have moved full-circle since Furman, holding that the very aspect of capital punishment that once made it unconstitutional now is necessary to comply with the Eighth Amendment. Cf.

[8] In oral argument in Franklin, Justice Scalia, responding to Franklin's argument that "residual doubt" was a mitigating aspect of the defendant's crime that the jury must consider, stated that such a doubt was a circumstance of the trial, and not of the offense. Franklin v. Lynaugh, No. 87-5546, Tr. Oral Arg. at 6. The state submits that the "mercy" Selvage and Franklin urge that a jury must consider is not a mitigating aspect of the defendant's character, but rather the character of the jurors, and should not be constitutionally mandated.

Lockett, 438 U.S. at 631 ("By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a 'mitigating circumstance,' it will not guide sentencing discretion but will totally unleash it.")(Rehnquist, J., concurring in part and dissenting in part).

III.

THE EIGHTH AND FOURTEENTH AMENDMENTS DO NOT ENTITLE A CAPITAL MURDER DEFENDANT TO QUESTION PROSPECTIVE JURORS CONCERNING PAROLE ELIGIBILITY REQUIREMENTS, WHEN ANY CONSIDERATION OF PAROLE IS PRECLUDED BY LAW AND THE JURY IS INSTRUCTED ACCORDINGLY.

The constitutional principles governing the limitation on the state's ability to restrict the scope of voir dire were laid out by the Court in Ristaino v. Ross, 424 U.S. 589, 594-95 (1976).

> The Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him. Voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." This is so because the "determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." Thus, the State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant. (citations omitted).

Ristaino held that voir dire questioning regarding racial prejudice is not constitutionally required absent a finding based on an assessment of "all of the circumstances presented" that there is a "significant likelihood that racial prejudice might infect [the] trial." Id. at 596-97. Ristaino limited Ham v. South Carolina, 409 U.S. 524 (1973), an earlier case reversed for failure to permit voir dire on racial prejudice, to its facts and noted that in Ham the racial issues were "inextricably bound up with the conduct of the trial." Id.

The Court explained its holding further in Rosales-Lopez v. United States, 451 U.S. 182 (1981). There the Court made clear that the Constitution accords "no presumption of juror bias for

or against members of any particular racial or ethnic groups" and establishes "no per se rule in such circumstances requiring inquiry as to such racial prejudice." Id. at 190.

> . . . Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.
>
> Absent such circumstances, the Constitution leaves it to the trial court and the judicial system within which that court operates, to determine the need for such questions. . . .

Id. Thus, contrary to Selvage's assertion, it is not the limits on voir dire that create an unreasonable risk of bias or prejudice infecting the trial process which violate due process. Rather, it is only when there are substantial indications of an unreasonable risk of bias or prejudice affecting the jurors' deliberations in a particular case that the trial court's denial of a defendant's request to examine the venire member on such a subject is elevated to constitutional dimension.

In urging an Eighth Amendment violation, Selvage interprets Turner v. Murray, 476 U.S. 1 (1986), as holding that the punishment of death and the application of the individualized sentencing doctrine create the unique opportunity for bias to operate undetected, and that unrestricted voir dire is essential to ensure the reliability of the sentencing proceeding. Selvage then assumes that full disclosure about parole is constitutionally indispensable to ensure the reliability of a capital sentencing proceeding by avoiding an unacceptable risk that the death penalty may be imposed based on mistaken notions of parole law.

Selvage takes the language of Turner out of the context of the decision. Rather than authorize a departure from Ristaino, Turner builds on its analytical framework to find the combination of an interracial crime with Virginia's individualized capital sentencing statute created "a unique opportunity for racial prejudice to operate but remain undetected," and held that a

capital defendant accused of such a crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of juror bias. Id. at ___, 106 S.Ct. at 1688 (emphasis added). The holding was firmly rooted in a federal habeas court's special responsibility to enforce the Fourteenth Amendment's prohibition of racial discrimination and constitutionalized the voir dire inquiry "on the facts of th[at] case." Turner, 476 U.S. at ___, 106 S.Ct. at 1687. The Court expressly noted that it was not retreating from Ristaino and affirmed the requirement of "special circumstances" showing a "significant likelihood that racial prejudice might infect [the] trial." Id. at ___, 106 S.Ct. at 1687 n. 7.[9]

The constitutional "significance" Selvage attaches to voir dire on parole eligibility is contrary to California v. Ramos, 463 U.S. 992 (1983). The factual "significance" he attaches is unprecedented, unsupported and illogical. Ramos recognizes that jury instructions on parole or clemency matters in capital cases are solely matters of state discretion.[10] Ramos found no constitutional violation in the state instructing the jury that the Governor may commute a life sentence. At the same time, it found no constitutional requirement that the jury be given an additional instruction that the Governor may also commute a death sentence. So holding, Ramos rejected the constitutional significance that Selvage now attaches to the jury's knowledge of parole: that full disclosure of clemency or parole matters is necessary to a reliable sentencing proceeding in a capital case because it may mitigate in favor of life by clarifying any

---

[9] Turner does not require the trial court to sua sponte voir dire on racial factors and does not constitutionally require such voir dire unless the crime was an interracial one.

[10] "Our conclusion [that the state may disclose to capital juries the Governor's power to commute a life sentence consistent with the Constitution] is not intended to override the contrary judgments of state legislatures that capital sentencing juries in their states should not be permitted to consider the Governor's power to commute sentences." Ramos, 461 U.S. at 1013-14.

misconceptions that the state instructions may cause. Moreover, the Ramos court found such information "would not eliminate any skewing in favor of death or increase the reliability of the sentencing choice." Ramos, 463 U.S. at 1011. In fact, the Court noted that the instruction the defense requested could decrease the reliability of the sentencing proceeding.

> [A]dvising jurors that a death verdict is theoretically modifiable, and thus not "final," may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.

Id. Moreover, instructing a jury on matters extraneous to the sentencing proceeding does not "foster the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case'" by helping "to limit the jury's consideration to matters in evidence before it." California v. Brown, ___ U.S. ___, 107 S.Ct. 837, 840 (1987).

As a factual matter, it is at best an exercise in sophistry to argue, as does Selvage, that a juror might decline to impose the death penalty if it were disclosed that a life sentence meant that the defendant would be incarcerated for a minimum of twenty years because the general public would be adequately protected by such a life sentence. Rather, informing jurors that the defendant will be eligible for release in twenty years would create in the jurors an expectation of early release and could predispose the jury to the belief that death is the only penalty sufficient to protect society. Moreover, there is no benefit to the defendant. One of the primary reasons why Texas has refused to permit the injection of parole considerations into capital trials is to prevent the jury from "increasing punishment in anticipation" of the possibility of granting parole, Munroe v. State, 637 S.W.2d 475, 477 (Tex. Crim. App. 1982), and this view is shared by a majority of the states. Ramos, 463 U.S. at 1013-14 n.30. Moreover, the possibility of the jury assessing death because of the possibility of parole is greater when the facts of the offense are as egregious as here.

Selvage's conclusion that jurors have "widely held misconceptions about the actual effect of imposing a life sentence" is, at best, rank speculation and, at worst, a rending of the jury's cloak of presumed impartiality. It not only presupposes that prospective jurors harbor such misconceptions, a supposition which has no support in this record, as the state trial court and the Court of Criminal Appeals accurately point out, see Ex parte Selvage, No. 16,884-02, at 163 (Findings of Fact and Conclusions of Law), but that the jurors will dishonor their oaths and disobey the instructions given by the court. Just as a court should not presume juror bias for or against member of any particular racial or ethnic group, Rosales-Lopez, 451 U.S. at 190, this Court should not presume that sentencers will disregard the court's instruction to not allow parole eligibility to enter into their punishment deliberations. Cf., Strickland v. Washington, 466 U.S. 668, 695 (1984) ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously and impartially applying the standards that govern the decision.")

Where, as here, the defendant demonstrates no reasonable, much less, substantial likelihood of bias or prejudice infecting the jury's consideration of the evidence and law as applied in the court's charge, the restriction on voir dire does not attain constitutional dimension. Even were the case otherwise, reversal would not be mandated. Each prospective juror was individually told that there were two possible sentences: death or life. The court's charge accurately reflected the sentencing alternatives and instructed the jury to remove any consideration of parole from its deliberations. The only reasonable interpretation of the cumulative instructions is that "life means life." Any error

in the trial court's refusal to permit voir dire on parole eligibility was harmless beyond a reasonable doubt.[11]

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER First Assistant
Attorney General

LOU MCCREARY
Executive Assistant
Attorney General for Litigation

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

ROBERT S. WALT*
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

*Counsel of Record

---

[11] Selvage further asserts that because a panel in King v. Lynaugh had previously reached a conclusion contrary to the decision of the court of appeals below, it was improper for the court below to have vacated the stay of execution, contending that the court ignored this Court's holding in Barefoot v. Estelle by elevating the state's interest in finality of its judgments "over the fundamental notions of orderly processes and due process." See Petition at 23. Review of the opinion below clearly results in the opposite conclusion. The court below noted that the district court held that the panel opinion in King represented the law in the circuit, which was an incorrect assumption in light of the fact that the opinion had been vacated. See Rule 41.3, Local Rules of the Fifth Circuit. The court of appeals below then analyzed the claim and determined that it had no constitutional basis, and therefore Selvage had no likelihood of success on the issue. It is clear that the court below correctly applied the well established rule of law in Barefoot in making its determination on the issue of a stay of execution.

ORIGINAL

(4)

No. 87 - 6700

Supreme Court, U.S.
FILED
MAY 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

DISTRIBUTED
MAY 25 1988

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID CUNNINGHAM
Texas Bar No. 05234400
1927 Norfolk
Houston, Texas 77098
(713) 520-7701

JULIUS L. CHAMBERS
* RICHARD H. BURR, III
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-1900

GEORGE KENDALL
31 Elm Street, Ste. 236
Springfield, MA 01103
(413) 781-1405

ATTORNEYS FOR PETITIONER

* Counsel of Record

No. 87 - 6700

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In its brief in opposition to Mr. Selvage's petition for writ of certiorari, the state premises its opposition upon a distorted characterization of the claims Mr. Selvage presents under Lockett v. Ohio. The state says that "Selvage argues that the Texas capital sentencing statute precludes jury consideration of relevant mitigating evidence that might serve as a basis for a sentence less than death." With the claims so characterized, the state then argues that the statute did not prevent consideration of the mitigating evidence available to Mr. Selvage because the mitigating evidence which was produced or which could have been produced on his behalf was logically relevant to the two special issues, the evidence was or could have been considered in the jury's course of responding to the special issues, and the jury's affirmative responses to the special issues was apparently no more than a decision to give greater weight to the competing evidence presented by the state than to the mitigating evidence presented by Mr. Selvage.

Though persuasive in relation to the state's characterization of Mr. Selvage's claims, this argument bears no weight in relation to the actual claims presented by Mr. Selvage. Mr. Selvage's claims do not center upon preclusion of the jury's consideration of mitigating evidence. Rather, they center upon the statute's failure to provide a constitutionally appropriate procedural vehicle for the jury to express its view that the mitigating evidence, once considered, does not warrant a death sentence. The statute allows "consideration" of any mitigating evidence logically relevant to the special questions, as in Mr. Selvage's case. However, if the mitigating evidence fails to negate the deliberateness of the murder or to assure the sentencer that the defendant poses no threat of dangerousness in the future, it cannot lead the jury to impose a life sentence, even though the sentencer might find that it should.

Notwithstanding the state's argument here, mitigating evidence can be sufficiently weighty to call for a life sentence even though it does not rebut the evidence showing that the homicide was committed deliberately or that the defendant may be dangerous in the future.

As it did in Mr. Selvage's case, the evidence may show beyond a reasonable doubt that the homicide was committed deliberately, yet may also show that it was the product of impaired judgment, exercised by one suffering from drug addiction and psychosis, who miscalculated the threat posed to others when he undertook an armed robbery, and who during the course of the robbery misperceived the threat posed to him by others and began shooting. Such a homicide may have been committed "deliberately and with the reasonable expectation that the death of the deceased or another would result," but shouldn't the jury also have the opportunity to say that, despite this, death should not be the sentence? Isn't this the very meaning of the Eighth Amendment's command that the sentencer be allowed to give independent mitigating weight to the evidence proffered in

mitigation? It is, but the Texas death penalty statute, as applied in Mr. Selvage's case, dishonored this command.

Similarly, the evidence may show beyond a reasonable doubt, as it did in Mr. Selvage's case, that the defendant is likely to be dangerous in the future because of his violent crimes in the past and, indeed, because he suffers from a form of mental illness which itself creates a greater vulnerability to engaging in violent behavior. Nevertheless, shouldn't the jury be able to decide that the very reason that the defendant may continue to pose a risk of danger in the future is a reason not to impose a sentence of death? Doesn't the Eighth Amendment require that the sentencer be allowed to decide that "defendants who commit criminal acts that are attributable . . . to emotional and mental problems [are] less culpable than defendants who have no such excuse," California v. Brown, ___ U.S.___, 93 L.Ed.3d 934, 942 (1987), and impose a life sentence because of this? Of course it does, but the Texas statute does not give the sentencer this option.

It is this -- the singular failure of the Texas statute to give the jury the option to impose life when it reasonably believes the evidence calls for life, even though the evidence simultaneously calls for an affirmative answer to the statutory special issues -- about which Mr. Selvage complains. It is not, as the state would frame it, the statute's "preclusion of the consideration of mitigating evidence."

While Mr. Selvage's trial counsel recognized this feature of the Texas statute -- so clearly that they refrained from investigating or presenting Mr. Selvage's mental illness as a mitigating circumstance -- they did not at the time they represented Mr. Selvage recognize that the Constitution could not tolerate it. They did not recognize that this feature of the statute was "a flaw" which was constitutionally assailable. The state's suggestion to the contrary is without any factual support. The reasonableness of their view, tested in the context

of the judicial decisions available to them at the time, is manifest.

Accordingly, for the reasons set forth in the petition, the Court should grant Mr. Selvage's petition or hold it pending the decision in Franklin v. Lynaugh.

May 24, 1988

Respectfully submitted,

DAVID CUNNINGHAM
Texas Bar No. 05234400
1927 Norfolk
Houston, Texas 77098
(713) 520-7701

JULIUS L. CHAMBERS
RICHARD H. BURR, III
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-1900

GEORGE KENDALL
31 Elm Street, Ste. 236
Springfield, MA 01103
(413) 781-1405

By: Richard H. Burr III

ATTORNEYS FOR PETITIONER

* Counsel of Record

No. 87 - 6700

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

CERTIFICATE OF SERVICE

I, RICHARD H. BURR III, hereby certify that the Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit herein has been served upon respondent by mailing a copy, by first class mail, to his counsel, Robert S. Walt, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, this 24th day of May, 1988.

Richard H. Burr III
Of Counsel

ORIGINAL (5)

RECEIVED
JUN 25 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DISTRIBUTED
JUN 27 1988

No. 87-6700

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

JUN 29 PAGE 15

PETITIONER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAVID CUNNINGHAM
Texas Bar No. 05234400
1927 Norfolk
Houston, Texas 77098
(713) 520-7701

JULIUS L. CHAMBERS
*RICHARD H. BURR, III
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-1900

GEORGE KENDALL
1145 Main St., Suite 304
Springfield, MA 01103

ATTORNEYS FOR PETITIONER

* Counsel of Record

No. 87-6700

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

PETITIONER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner, JOHN HENRY SELVAGE, through his undersigned counsel, respectfully submits this supplemental memorandum in light of the Court's recent disposition of the case of Franklin v. Lynaugh, No. 87-5546.

1. On June 22, 1988, this Court, by a vote of 6 to 3, rejected Donald Franklin's claim that the Texas capital sentencing statute, as applied to him, violated the Eighth Amendment because it precluded consideration of evidence in mitigation. The Court concluded that no evidence that could properly be characterized as "mitigating" had been precluded from consideration. However, a majority of the Court (those in dissent and those concurring with the judgment) also acknowledged that there are cases involving evidence in mitigation different from that presented in Franklin where the statute would function to limit the jury's ability to give mitigating effect to the evidence, in violation of the Eighth Amendment. Mr. Selvage's case is just such a case.

2. The concurring opinion specifically points to evidence directly related to the personal culpability of the criminal defendant that the jury must be allowed to consider in assessing punishment in a capital case. (Slip op. at 4). The opinion cites "[e]vidence of voluntary service, kindness to others, or of religious devotion" as examples of evidence which "might demonstrate positive character traits that might mitigate against the death penalty" and thus must not be precluded from the jury's consideration. There was evidence in Mr. Selvage's case that he was a well-behaved child and good student from a very close, religious family, and that he had not been in trouble until he returned from military service, where he had developed an addiction to heroin. (See petition for writ of certiorari at pp. 4-5). Subsequent investigation also revealed that Mr. Selvage had a history -- well-documented by the time of the offense in Air Force and prison medical records and subsequent to the offense by the respondent's records -- of psychosis and paranoid schizophrenia. It is not uncommon for people with this kind of psychiatric history to turn to drugs in an attempt at self-medication.

3. The Texas statute served to limit the jury's consideration of Mr. Selvage's mitigating evidence in two ways. First, the evidence before the jury of Mr. Selvage's exemplary background before his military service and his subsequent and tragic addiction to drugs had no relevance to the issues of deliberateness or future dangerousness, and thus could not be given independent mitigating effect. Second, the sentencing procedure utilized by Texas created a situation where the jury was not given relevant information in mitigation, because there was no way for the information to be given mitigating, rather than exclusively aggravating, effect. Counsel for Mr. Selvage made the reasonable judgment based on their experience that "it was rare for jurors to find mental illness so incapacitating as to interfere with a defendant's ability to commit deliberate acts" and thus answer the question of deliberateness negatively, and that any evidence of incurable mental disease or defect would be extremely damaging, because the state routinely produced

psychiatric witnesses who would convert any evidence of any mental disease or defect into evidence of likely future dangerousness. (See quote from counsel's affidavit at petition pp. 6 - 7). Thus, this powerful evidence of reduced moral culpability was neither investigated nor presented.

4. The effect of the statute on counsel's investigation and preparation is an issue not decided by the Court in Franklin, but is essentially the same as an issue presented to this Court in Hitchcock v. Dugger, 481 U.S. ___, (1987). The Court did not decide the issue in Hitchcock, because the case was reversed on other grounds. The issue is one that is likely to recur in the context of the Texas death sentencing scheme.

WHEREFORE, for all the reasons stated above, and all the reasons presented in the petition for writ of certiorari, John Henry Selvage respectfully requests that certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit denying habeas corpus relief in this case.

Respectfully submitted,

DAVID CUNNINGHAM
Texas Bar No. 05234400
1927 Norfolk
Houston, Texas 77098
(713) 520-7701

JULIUS L. CHAMBERS
*RICHARD H. BURR, III
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-1900

GEORGE KENDALL
1145 Main St., Suite 304
Springfield, MA 01103

ATTORNEYS FOR PETITIONER

By Richard H Burr III

* Counsel of record

Certificate of Service

I, Richard H. Burr, III, a member in good standing of the Bar of the Court, hereby certify that the foregoing Supplemental Memorandum in Support of Petition for Writ of Certiorari has been served upon respondent by sending a copy, via first class mail, to his counsel, Jim Mattox, Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, this 24th day of June 1988.

Richard H Burr III

Richard H. Burr, III

No. 87-6700

FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

JOHN HENRY SELVAGE,

Petitioner,

vs.

JAMES LYNAUGH, Director, Texas Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

JULIUS L. CHAMBERS
*RICHARD H. BURR
GEORGE H. KENDALL
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 219-1900

DAVID CUNNINGHAM
1927 Norfolk
Houston, Texas 77098
(713) 520-7701

Counsel for Petitioner

*ROBERT S. WALT
Asst. Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2080

Counsel for Respondent

*Counsel of Record

Petition For Certiorari Filed March 29, 1988
Certiorari Granted October 10, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

85 PW

TABLE OF CONTENTS

Page

Relevant Docket Entries in the Courts Below..... 1

Penalty Phase Jury Instructions, *State v. John Henry Selvage*, No. 305, 495, District Court of Harris County, Texas, 230th Judicial District 3

Defendant's Motion to Instruct Jury, *State v. John Henry Selvage*, same court 5

Petition for Writ of Habeas Corpus, *Selvage v. Lynaugh*, No. H-88-166, United States District Court for the Southern District of Texas 7

Order of the state trial court recommending denial of state application for writ of habeas corpus 29

Order of Texas Court of Criminal Appeals adopting the trial court's recommendation on writ of habeas corpus 38

Respondent's pleading in response to federal petition for writ of habeas corpus 40

Orders of the United States District Court with respect to the habeas petition 63

Order and Opinion of the United States Court of Appeals for the Fifth Circuit 68

Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis October 10, 1989 83

RELEVANT DOCKET ENTRIES IN THE COURTS BELOW

February 8, 1980 –	Verdict of guilty of capital murder, *State v. Selvage*, No. 305, 495, District Court of Harris County, Texas, 230th Judicial District
February 11, 1980 –	Jury findings entered requiring imposition of sentence of death, *State v. John Henry Selvage* (same case)
March 12, 1980 –	Judgment of guilt and sentence of death entered, *State v. John Henry Selvage* (same case)
January 22, 1988 –	Petition for Writ of Habeas Corpus filed, *Selvage v. Lynaugh*, No. H-88-166, United States District Court for the Southern District of Texas
March 14, 1988 –	Order recommending denial of application for writ of habeas corpus, *Ex parte John Henry Selvage*, No. 305495-B, District Court of Harris County, Texas, 230th Judicial District
March 18, 1988 –	Order adopting the recommendation of the District Court of Harris County, *Ex parte John Henry Selvage*, No. 16, 884-02, Texas Court of Criminal Appeals

March 24, 1988 –	Respondent's Answer, Motion to Dismiss for Abuse of the Writ, Motion for Summary Judgment and Supporting Brief, and Opposition to Application for Stay of Execution filed, *Selvage v. Lynaugh* No. H-88-166, United States District Court for the Southern District of Texas
March 25, 1988 –	Orders staying execution, dismissing some claims, and entering final judgment, *Selvage v. Lynaugh* (same court)
March 28, 1988 –	Order and opinion vacating stay of execution, denying stay pending appeal of dismissed claims, and denying certificate of probable cause, *Selvage v. Lynaugh*, No. 88-2278, United States Court of Appeals for the Fifth Circuit (842 F.2d 89)

CAUSE NO. 305,495

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	OF HARRIS COUNTY, TEXAS
JOHN HENRY SELVAGE	230TH JUDICIAL DISTRICT
	FEBRUARY TERM, A.D. 1980

MEMBERS OF THE JURY:

By your verdict returned in this case you have found the defendant guilty of the Offense charged in the indictment, that is, capital murder, which was alleged to have been committed in Harris County, Texas, on or about the 30th day of July, 1979.

You are instructed that the punishment for capital murder is by death or confinement in the penitentiary for life.

In connection with your consideration of the evidence presented with respect to the assessment of punishment, I am submitting to you certain issues to be determined by you in accordance with instructions which I shall also give you. The State must prove each issue submitted beyond a reasonable doubt, and you shall return a special verdict of "Yes" or "No" on each issue submitted.

You are not to discuss among yourselves how long the accused would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor, and are no concern of yours.

You are further instructed that you may not answer any issue "Yes" unless you agree thereon unanimously;

and you may not answer any issue "No" unless ten (10) or more jurors agree.

ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt whether the conduct of the defendant, John Henry Selvage, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER: Yes

ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt whether there is a probability that the defendant, John Henry Selvage, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: Yes

/s/ Joe Kegans
JOE KEGANS, JUDGE PRESIDING
230TH DISTRICT COURT
HARRIS COUNTY, TEXAS

VERDICT

We, the Jury, return in open court the above answers as our answers to the issues submitted to us and the same is our verdict in this case.

/s/ Joe M. McDaniel
FOREMAN OF THE JURY

Filed: February 11, 1980

305495
No. 300,503

(Caption omitted in printing)

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
230TH JUDICIAL DISTRICT
FEBRUARY TERM, A. D. 1980

DEFENDANT'S MOTION TO INSTRUCT JURY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant JOHN HENRY SELVAGE, who asks this Court to instruct the jury that under the present state of the law of the Texas Penal Code and the Court of Criminal Procedure that they cannot convict an individual of capital murder if they find that that individual was only a party to the transaction and not the actual "trigger man".

I.

Your Defendant would show this honorable court that the legislature in the inactment (sic) of the capital murder statue (sic) never intended for the law to apply to parties, but only to "trigger man".

The Defendant would further urge that the court consider the attached affidavits from members of the Legislature, plus any other evidence introduced on the witness stand through members of the Texas Legislature.

Respectfully submitted,

DENNIS B. KELLY
ATTORNEY FOR DEFENDANT

JOHN EMMETT CROW
ATTORNEY FOR DEFENDANT

Filed: February 8, 1980

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254

Prisoner's Name:	JOHN HENRY SELVAGE
Prisoner's Number:	DR 652
Place of Confinement:	Ellis I Unit, Texas Department of Corrections

JOHN HENRY SELVAGE, Petitioner, v. JAMES LYNAUGH, Director, Texas Department of Corrections, Respondent.	:	No. H-88-166

To the Honorable Judge of the United States District Court for the Southern District of Texas: Petitioner JOHN HENRY SELVAGE prays for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and in support of his request sets forth the following:

HISTORY OF PRIOR PROCEEDINGS

1. The District Court of Harris County, Texas, 230th Judicial District, in and for Harris County, entered the judgment under attack.

2. Mr. Selvage was indicted on December 4, 1979, for the capital murder of Albert Garza.

3. Mr. Selvage entered a plea of not guilty.

4. Mr. Selvage was tried before a jury on February 4-8, 1980. On February 8, 1980, the jury returned a verdict of guilty of capital murder.

5. Mr. Selvage did not testify at either stage of his trial.

6. The sentencing proceedings were conducted on February 8-11, 1980. On February 11, 1980, the jury returned a verdict affirmatively answering the two sentencing issues presented to them.

7. In accordance with the jury's verdict, on March 12, 1980, Mr. Selvage was adjudicated guilty and sentenced to death.

8. The Texas Court of Criminal Appeals affirmed the conviction and sentence on July 11, 1984. *Selvage v. State*, 680 S.W.2d 17 (Tex. Crim. App. 1984). Rehearing was denied on October 10, 1984. *Id.*

9. Mr. Selvage did not file a petition for writ of certiorari in the Supreme Court of the United States.

10. In addition to his direct appeal, Mr. Selvage has filed the following petitions, applications, and motions with respect to the conviction and sentence challenged herein:

(a) After the affirmance by the Texas Court of Criminal Appeals, counsel for Mr. Selvage filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas.

(b) The District Court denied habeas corpus relief without an evidentiary hearing on October 6, 1986.

Counsel for Mr. Selvage had moved his office without notifying the clerk's office or the Court, and therefore did not receive notice of the order until October 23, 1986. He then notified Mr. Selvage by letter that he would no longer represent him. He did not file a notice of appeal, did not inform Mr. Selvage of the deadline for filing a notice of appeal, and did not move to withdraw from the case nor otherwise inform the Court that he no longer wished to represent Mr. Selvage.

(c) Mr. Selvage was not able to obtain new counsel until February 20, 1987. On February 27, new counsel filed a Motion to Alter or Amend the Judgment under Rule 60 of the Federal Rules of Civil Procedure. He also requested permission to file an amended petition for writ of habeas corpus. On March 4, 1987, the District Court denied the motion to amend the petition, but vacated its prior judgment, readopted its order denying habeas corpus relief, and granted a certificate of probable cause to appeal.

(d) On March 3, 1987, Mr. Selvage filed a State Application for Writ of Habeas Corpus in the District Court for the 230th Judicial District, Harris County, Texas. His application was denied the same day.

(e) On March 6, 1987, in an unreported opinion, the Texas Court of Criminal Appeals adopted the trial court's decision denying relief. *Selvage v. Lynaugh*, CCA No. 16884-01 (March 6, 1987).

(f) On July 23, 1987, the United States Court of Appeals for the Fifth Circuit affirmed the denied (sic) of federal habeas corpus relief. *Selvage v. Lynaugh*, 823 F.2d 845 (5th Cir. 1987).

(g) The Supreme Court of the United States denied a petition for writ of certiorari on October 2, 1987. *Selvage v. Lynaugh*, ___ U.S. ___, 98 L.Ed.2d 268 (1987).

(h) *Mr. Selvage's execution is presently scheduled for January 27, 1988 (after midnight January 26, 1988). No stay of execution is in effect.*

GROUNDS FOR HABEAS CORPUS RELIEF

* * *

III.

TEXAS' CAPITAL SENTENCING PROCEDURE GENERALLY, AND THE INSTRUCTIONS GIVEN TO THE JURY IN THIS CASE SPECIFICALLY, DO NOT ALLOW FOR THE CONSIDERATION OF EVIDENCE IN MITIGATION PROFFERED BY THE DEFENSE AS THE BASIS FOR A SENTENCE LESS THAN DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SIMILAR PROVISIONS OF THE TEXAS CONSTITUTION.

18. At the penalty phase of Mr. Selvage's trial, each side offered additional evidence supporting its view of the appropriate sentence. As described in detail in Ground II, the state offered evidence of prior convictions and unadjudicated criminal activity. The state brought this evidence before the jury to support its claim that Mr. Selvage deliberately murdered the victim in this case, and would commit dangerous criminal acts in the future.

19. The defense offered evidence to mitigate or lessen the jury's resolve to resort to the ultimate penalty. Audrey Picou, Mr. Selvage's older sister, testified and

described his upbringing. She told the jury that he had been raised in a very close, religious family, and unlike other children they knew, had been exposed to the arts and music. R. 2895-2912. During his school years, she described Mr. Selvage as being an "A" and "B" student. *Id.* Throughout his early and school years, Mrs. Picou testified that he was a happy, normal child.

20. In 1968, she recalled, Mr. Selvage was drafted into the Army. When he was discharged not quite two years later, he came back a different person. In her terms "he came back in a straightjacket." R. 2910. He had become addicted to heroin and spent several months in Army hospital treatment centers. When he finally returned to New Orleans, he was not able to work for a period of time, but later found work at a gas station.

21. She testified further that she had never seen Mr. Selvage exhibit violent behavior and opined that he was a peaceful person. This was consistent with their family, she said: no other family member had ever been arrested. She also opined that Mr. Selvage had the strength of character to be rehabilitated.

22. The defense also called Dr. Jose Garcia, Chief of Mental Health Services for the Texas Department of Corrections. R. 2924. Dr. Garcia described in detail the numerous rehabilitative programs offered by the Department of Corrections to inmates.

23. After both sides rested, the defense asked that the court instruct the jury that if it found that Mr. Selvage was not the triggerman, it must return a life sentence. The trial court denied this request. R. 2937.

24. The trial court's sentencing charge thereafter was cryptic and made no mention of Mr. Selvage's mitigating evidence. Instead, it focused almost exclusively upon special issues 1 and 2:

> MEMBERS OF THE JURY: By your verdict returned in this case you have found the Defendant guilty of the offense charged in the indictment, that is, Capital Murder, which was alleged to have been committed in Harris County, Texas, on or about the 30th Day of July, 1979.
>
> You are instructed that the punishment for capital murder is by death or confinement in the penitentiary for life.
>
> In connection with your consideration of the evidence presented with respect to the assessment of punishment, I am submitting to you certain issues to be determined by you in accordance with instructions which I shall also give you. The State must prove each issue submitted beyond a reasonable doubt, and you shall return a special verdict of "Yes" or "No" on each issue submitted.
>
> You are not to discuss among yourselves how long the accused would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor, and are no concern of yours.
>
> You are further instructed that you may not answer any issue "Yes" unless you agree thereon unanimously; and you may not answer any issue "No" unless ten (10) or more jurors agree.

> ISSUE NO. 1
>
> Do you find from the evidence beyond a reasonable doubt whether the conduct of the defendant, John Henry Selvage, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> ANSWER: _____
>
> ISSUE NO. 2
>
> Do you find from the evidence beyond a reasonable doubt whether there is a probability that the defendant, John Henry Selvage, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> ANSWER: _____

R. 111-112.

25. This instruction failed to provide the jury with the constitutionally necessary opportunity to consider, and determine Mr. Selvage's sentence on the basis of considering, the mitigating evidence. The charge failed to provide the jury with a definition of the concept of mitigation, and further failed to charge the jury that it must consider such evidence. For these reasons alone, the instruction precluded an individualized sentencing determination.

26. The charge also failed to provide the jury with the means to act upon the mitigating evidence it heard if it reached the conclusion that the mitigating evidence called for a sentence less than death.

(a) The only two issues which the court's charge permitted the jury to consider are really aggravating circumstances: whether the crime was committed deliberately to cause death, and whether there exists a possibility that the defendant would commit additional criminal acts of violence in the future.

(b) The wealth of life history evidence presented on behalf of Mr. Selvage demonstrated that he was a person of value whose unfortunate addiction to drugs had led to his involvement in the crime, but who, for this very reason, could be forgiven, to the extent of sparing his life, for his involvement in the crime.

(c) The jury was not informed that this mitigating evidence might be considered as bearing upon the two special issues, to which it was not self-evidently relevant, nor that it might bear independently upon the choice of sentence. The jury was told only to answer the two special issue questions yes or no. Accordingly, neither through these verdicts nor outside of them could the jury voice its view of the effect, if any, that it thought the mitigating evidence should have. As the Fifth Circuit has recently described this problem in another case,

> The jury was allowed to hear all evidence that might mitigate the culpability of [the petitioner's] deeds or his person. The jury could then consider (*i.e., think about*) the bearing of all of the evidence, aggravating and mitigating, upon the ultimate question of whether [petitioner] should be put to death. If, however, that consideration should lead the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict? No interrogatory asks about that most crucial decision. Having said that it was a deliberate murder and that [petitioner] will be a continuing threat, the jury can say no more.

Penry v. Lynaugh, 832 F.2d 915, 920 (5th Cir. 1987).

(d) The Constitutions of Texas and the United States cannot tolerate such a sentencing scheme: they require that the jury be free to consider and act upon such evidence so as to impose a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978).

IV.

IN FAILING TO EXPLICITLY PROVIDE A MEANS BY WHICH THE JURY COULD CONSIDER AND GIVE INDEPENDENT MITIGATING WEIGHT TO MITIGATING EVIDENCE, THE TEXAS CAPITAL SENTENCING PROCEDURE PRECLUDED THE PRESENTATION OF ADDITIONAL MITIGATING EVIDENCE ON BEHALF OF MR. SELVAGE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SIMILAR PROVISIONS OF THE TEXAS CONSTITUTION

27. Mr. Selvage is psychotic now and has suffered continually from severe psychosis since at least 1970. In 1979, when he participated in the commission of the robbery that led to the homicide herein, Mr. Selvage was psychotic. His psychosis vitiated, or at least substantially diminished, his responsibility for the crime. However, the jury did not know this, because no evidence of Mr. Selvage's mental illness was presented at his trial.

28. This evidence was not presented because trial counsel, in reasonable reliance upon the statute's limitation, forewent substantial investigation, presentation and

argument of this compelling mitigating evidence. He forewent those essential functions of defense counsel in a capital case because Texas' capital sentencing scheme precluded consideration of Mr. Selvage's illness as mitigating evidence in the circumstances of his case. If presented, this evidence would have assisted the *state* in proving that the homicide was committed deliberately and that there was a possibility that Mr. Selvage would be violent in the future. Notwithstanding this, the very same evidence would also have weighed heavily in favor of a life sentence. However, the jury would have had no means through which to give effect to the *mitigating* weight of this evidence, for upon giving the evidence aggravating weight – which it would have been constrained to do – the jury's "consideration" of this evidence would have mandated the death sentence. For this reason, the Texas capital sentencing procedure constrained defense counsel not to present, *i.e*, precluded the presentation of, evidence of Mr. Selvage's severe mental illness. Mr. Selvage's rights to the effective assistance of counsel and to an individualized sentencing determination were violated in the process.

29. By the time Mr. Selvage participated in the robbery that led to the homicide herein, he had suffered the debilitating symptoms of psychosis for almost a decade.

(a) In April, 1970, Mr. Selvage was medically discharged from the Air Force, because he was beginning to suffer from psychotic symptomatology. The examination which precipitated this discharge revealed the following:

> *INTRODUCTION*: This 19-year old A1C single Negro male was admitted to the psychiatric

> ward after being seen in the emergency room as the patient rammed his fist through a window in an attempt to catch the people that he thought were "spying" on him.
>
> *HISTORY PRESENT ILLNESS*: The patient stated he has been in the service for approximately 16 months; the last nine months here at Clark. He stated his difficulties started about two months ago in that he had trouble concentrating on the job and his supervisor "got mad at him." His supervisor sent him to the mental health clinic for an evaluation; however, before an appointment could be made, he was brought in as an "emergency" on Jan 29, 70 by his first sergeant as the patient had allegedly stated he was going to kill his supervisor. He was evaluated by Sgt. Carpenter in the Mental Health Clinic and felt to be depressed as well as having borderline mental deficiency, (WAIS full scale score of 78). He was scheduled to see the psychiatrist for the possibility of a 39-12 discharge; however, on 6 Feb he was seen in the emergency room after he rammed his fist through a window. Psychiatric consultation was obtained and he was admitted to the psychiatric ward. On admission the patient explained that he and his supervisor had been having multiple disagreements. He stated that his supervisor believed him to be on drugs because the patient had difficulty in performing his duties at work. He stated that he has felt people were watching him everywhere on base. He also admitted hearing whispering voices at night over the past few weeks and he felt that these voices were talking about him. The patient stated that these things ;[sic] were very disturbing to him and he had difficulty sleeping at night and performing his duties at work.
>
> * * *
>
> *MENTAL STATUS EXAMINATION*: The patient is oriented x3 spheres. His affect was blunted.

> His associations intact. The mood was that of depression and apathy. Suicidal ideation were denied. The patient admits to frequent ideas of reference occurring over the past several weeks and there is [sic] several episodes of questionable auditory hallucinations, i.e. "whispering voices", occurring several nights prior to his hospitalization. These have subsided since he has been hospitalized. The patient is essentially non-verbal and is of borderline intelligence.

Appendix A (submitted herewith).

(b) In this report alone, Mr. Selvage exhibited six of the recognized symptoms of a severe form of psychotic illness, paranoid schizophrenia, including

> auditory hallucinations in which either a voice keeps up a running commentary on the individual's behavior or thoughts, or two or more voices converse with each other[;]
>
> auditory hallucinations on several occasions with content of more than one or two words, having no apparent relation to depression or elation[;]
>
> marked poverty of content of speech if associated with . . . blunted . . . affect [;]
>
> marked impairment in role functioning as wage-earner[;]
>
> odd or bizarre ideation, or magical thinking, e.g., . . . ideas of reference [;] [and]
>
> unusual perceptual experiences, e.g. recurrent illusions, sensing the presence of a force or person not actually present[.]

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 188-90 (3d ed. 1980) ("DSM-III").

(c) Thereafter, when Mr. Selvage was incarcerated on a federal criminal conviction in the latter half of the 1970's Bureau of Prisons mental health personnel diagnosed him in accord with these symptoms, as suffering from "paranoid schizophrenia." Appendix B. Even though Mr. Selvage's Bureau of Prisons medical records appear to be incomplete in some respects, those records document the Bureau's finding that Mr. Selvage suffered from paranoid schizophrenia or some other psychotic disorder from at least January, 1977 until his release in late 1978. Beginning in January, 1977 and continuing until his release, Mr. Selvage was given daily therapeutic doses of Thorazine, a drug used in the treatment of severe psychotic illness. Appendix B.

30. In December, 1987 and again in January, 1988, Mr. Selvage was examined by Dr. James R. Merikangas, an experienced and highly-qualified practicing psychiatrist who serves as well as a professor of psychiatry at the Yale University School of Medicine. *See* Appendix C (curriculum vitae of Dr. Merikangas). On the basis of Mr. Selvage's documented history of psychosis and his own recent examination of Mr. Selvage, Dr. Merikangas concluded that Mr. Selvage still suffers from a psychotic illness and is presently quite psychotic:

> In summary, John Selvage is a man with a well-documented history of psychosis from at least 1969 or 1970. He sustained a severe head injury which in a chart is referred to as a skull fracture in late 1975 or early 1976 and was placed on Dilantin. The Dilantin has been given to him by prison authorities since that time. He was receiving anti-psychotic medication during his incarceration from February, 1976 until October, 1978 and was diagnosed as being paranoid

> schizophrenic at that time. After his incarceration on death row in 1980, the department of corrections resumed treatment of him with a variety of antipsychotic medications and Dilantin. That treatment has continued throughout his death row incarceration. Mr. Selvage is currently psychotic and despite receiving medication and psychological treatment, suffers from delusions, hallucinations and flight of ideas.

Appendix D, at 3.

31. Moreover, Dr. Merikangas determined that Mr. Selvage was likely psychotic at the time that the robbery-murder occurred in July, 1979. He has explained his reasoning in this regard as follows:

> In light of his history, it is my opinion that Mr. Selvage was suffering from a psychosis as well as other disorders at the time of the crime. It should be noted that the crime occurred when Mr. Selvage was not institutionalized and not, therefore, likely receiving consistent drug therapy or treatment. Given that Mr. Selvage's psychotic processes are not in full remission even when he is receiving consistent treatment, it is highly likely that he was acutely psychotic during the time when the crime took place.

Appendix D, at 3-4.

32. Dr. Merikangas' reasoning is strongly supported by the Texas Department of Corrections' assessment and treatment of Mr. Selvage since he has been on death row. TDC mental health personnel have consistently diagnosed Mr. Selvage as suffering from psychosis, because he has suffered from three of the major symptoms of paranoid schizophrenia since he has been on death row:

(a) He has experienced "bizarre delusions (content is patently absurd and has no possible basis in fact), such as delusions of being controlled," *DSM-III*, at 188. He feels that he has another being in him which periodically "possesses him." During these times he engages in bizarre behavior, such as growling, staring in a mirror and grunting, rocking back and forth in a fetal-like position, and head-banging. *See, e.g.*, Appendix E, at 1, 3, 7, 9-10, 11, 12-13. TDC personnel have characterized these incidents as "episodic lapses into bizarre and apparently psychotic delusions." *Id.* at 10.

(b) Mr. Selvage has also suffered "somatic . . . delusions without persecutory or jealous content," *DSM-III*, at 188. Typically, he "reports strange and bizarre somatic symptoms, feels [his] body swell after exercise, and [believes] that hot fluids cause an infection that makes him so fearful he feels like killing himself." Appendix E, at 5. TDC personnel have observed on several occasions that these "somatic delusions persist." *See, e.g.*, Appendix E, at 6, 8.

(c) Further, Mr. Selvage has suffered "delusions with persecutory . . . content . . . accompanied by hallucinations," *DSM-III*, at 189. One of the most striking examples of Mr. Selvage's suffering this kind of delusion was recorded when he refused to leave his cell during the course of a routine cell-search:

> Pt. refusing to come out of cell stating his rec[reation] group [was] going to get [an officer] to kill him. He agreed to leave his cell for search if I stayed with him, which I did. Pt. continued to discuss his paranoia with me, alternately stating "guy in next cell; dude in 14 cell" etc. "is going to kill me." When I showed him the cells

> were empty, he then began discussing the possibility that "it's all in my head." I continued to deal with his fears, reassuring him that even though he was hallucinating, these seemed just as real to him.

Appendix E, at 4.

33. On the basis of his reasoning that Mr. Selvage was psychotic at the time of the robbery-murder herein, Dr. Merikangas has explained that the psychosis likely would have made Mr. Selvage insane, or at least would have substantially impaired his capacity to appreciate the wrongfulness of his criminal conduct or to refrain from engaging in such conduct, at that time:

> In my opinion, John Selvage was not fully responsible for his behavior at that time. His psychosis, the residual effects of his severe and long history of drug abuse, including opiates and amphetamines, in combination, resulted in a diminished capacity to appreciate the wrongfulness of his conduct and rendered him less than fully capable of conforming his conduct to the requirements of law. According to John, he was high on heroin and amphetamines at the time of the crime. Amphetamines alone can induce a paranoid state and generate increased motor activity, resulting in paranoid ideation and violent acts which may be completely spontaneous or in response to command hallucinations. The kind of brain injury that John has probably suffered would have compounded both the drug-induced paranoia and his preexisting psychosis, for such an injury lowers one's ability to modulate and resist strong impulses. The severity of John's psychosis would likely have caused him to misperceive simple gestures as threats and to act on them

> without any basis in reality. While these combined factors could have produced a violent, uncontrolled outpouring of aggressive behavior, John's use of heroin could have mollified his aggression – if the dosage were high enough – and taken away his will to act. In this state, without the ability to perceive the external world accurately and make appropriate judgments in response to it because of his psychosis, John could have been peculiarly susceptible to the coercion, influence, and designs of others. In either event, I am of the opinion, to a reasonable medical certainty, that John could not distinguish the boundaries between right and wrong and could not in any way reign in his behavior to conform to the expectations of the external world.

Appendix D, at 4.

34. There can be no question that evidence such as this would have established a prima facie basis for finding a very substantial mitigating circumstance. As Justice O'Connor has explained:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

California v. Brown, ___ U.S. ___, 93 L.Ed. 2d 934, 942 (1987). *See also Skipper v. South Carolina*, ___ U.S. ___, 90 L.Ed.2d 1, 12 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring)("[s]ociety's legitimate desire for retribution is less strong with respect to . . . defendants who have reduced capacity for considered

choice[;] . . . [e]vidence concerning the defendant's . . . emotional history thus bear[s] directly on the fundamental justice of imposing capital punishment").

35. As Mr. Selvage's lead trial counsel has explained, however, the Texas capital punishment sentencing procedure forced counsel, through his reasonable understanding of how the procedure functioned (as opposed to how an appellate court might declare it *should* function), to refrain from presenting such evidence. *See* Appendix F. It did so for the following reasons:

(a) No matter how powerfully this evidence supported a life sentence, it bore an equally substantial risk of establishing, or helping to establish, the two "special issues" to which the jury's consideration was directed and limited. The jury, under Texas law, would receive instruction on the two special issues, but would *not* be instructed as to mitigating circumstances or on the jury's power to impose a life sentence even if the answers to both questions were "yes." Counsel could reasonably believe that by force of state law, therefore, what should be considered mitigating could be transformed into evidence *requiring* a death sentence.

(b) On the basis of the guilt-innocence portion of Mr. Selvage's trial, the evidence left a genuine question as to whether Mr. Selvage was the triggerperson in the homicide. Under Texas' law of parties, which was charged deficiently in the guilt-innocence phase, *see Selvage v. State*, 680 S.W. 2d 17, 20-21 (Tex. Cr. App. 1984), the jury could have convicted Mr. Selvage without finding that he had the intent to kill or that he was the actual

killer. *Id.* Although the courts have found that the evidence was sufficient to support such a finding, it was far from overwhelming, and the jury could have convicted without making such a finding. For this reason, there was some question in the penalty phase as to whether Mr. Selvage "committed [the homicide] deliberately and with the reasonable expectation that the death of the deceased or another would result." (Issue No. 1). Again, the courts have found that the evidence was sufficient to support a "yes" answer to issue one but was not overwhelming. As the Court of Criminal Appeals noted, "[A]lthough there is no direct evidence that appellant shot the deceased, the evidence was sufficient to show that his conduct was committed deliberately and with reasonable expectation that death would result." 680 S.W.2d at 22.

(c) In these circumstances, the presentation of "mental" mitigating evidence, such as could have been presented on behalf of Mr. Selvage, could have *strengthened* the evidence supporting the finding of deliberateness. By showing that Mr. Selvage suffered from paranoid schizophrenia, for example, the defense could have shown that Mr. Selvage was peculiarly susceptible to misperceiving non-threatening acts as threats, and to taking self-defensive action in response to these threats when such action was not called for. Unmedicated, as he likely was, Mr. Selvage was susceptible to this kind of behavior. *See* Appendix D, at 4. To be sure, Mr. Selvage's illness could also have been found to have *reduced* the likelihood that he engaged in a deliberate killing, Appendix D, at 4, but the evidence nonetheless presented a risk of adding to, rather than detracting from, the state's proof of deliberateness.

(d) Similarly, the evidence that could have been offered of Mr. Selvage's mental illness could also have *strengthened* the evidence supporting the finding of "a probability that the defendant . . . would commit criminal acts of violence that would constitute a continuing threat to society." (Issue No. 2). As Dr. Merikangas has explained, if Mr. Selvage does not take sufficient anti-psychotic medication on a daily basis, he presents a greater risk of violence than the non-psychotic person. Appendix D, at 4. To be sure, if he takes his medication as prescribed, he presents *no greater risk*. *Id*. Thus, the evidence of mental illness could have been found to have *reduced* the likelihood of future dangerousness. However, the jury could have been concerned about whether he would be sufficiently compliant to avoid this risk and could, accordingly, have treated this evidence as supporting a "yes" answer to issue two.

(e) Since mental health mitigating evidence could have run the risk of increasing the likelihood that the jury would answer the two special issues "yes," and Mr. Selvage's counsel reasonably believed that there was no provision under Texas law for the jury to give independent *mitigating* weight to the evidence, counsel had no choice but to refrain from presenting this evidence. If the Special issues were answered affirmatively, the death sentence was mandatory. There would be no opportunity for counsel to argue to the jury, or for the jury to find, that the mitigating weight of Mr. Selvage's mental illness was substantial enough to call for a life sentence, *even though* – in part due to his illness – the killing was deliberate and there was a probability that he would pose

a threat of violence in the future. As defense counsel put it

> The jury was given no third option under the Texas statute – to consider whether the evidence of mental illness was substantial enough as a mitigating circumstance to call for a life sentence, even in the face of the affirmative findings on the special issues. Thus, we could conceive of no way that such evidence could help Mr. Selvage.

Appendix F, at 3. Even if appellate courts hold counsel's interpretation of the law to be incorrect, it is unquestionably a reasonable interpretation of the law. If a statute which, when reasonably – though by appellate standards, incorrectly – interpreted, prevents counsel from investigating, presenting and arguing substantial evidence in mitigation, it functions as unconstitutionally as one which unequivocally precludes consideration of evidence in mitigation.

36. For these reasons, the Texas sentencing procedure precluded the presentation of substantial mitigating evidence on behalf of Mr. Selvage.

* * *

WHEREFORE, Mr. Selvage prays that this Court:

A. Issue a writ of habeas corpus to have him brought before it, to the end that he may be discharged from his unconstitutional confinement and restraint and/or be relieved of his unconstitutional sentence of death;

B. Conduct a hearing at which proof may be offered concerning the allegations of his petition, including the testimony of experts;

C. Permit him, because of his indigency, to proceed without prepayment of costs or fees;

D. Grant him, because of his indigency, sufficient funds to secure expert and lay testimony necessary to prove the facts as alleged in his petition;

E. Grant him the authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts as alleged in his petition;

F. Allow him a reasonable period of time subsequent to any hearing this Court determines to conduct, in which to brief the issues of law raised by this petition;

G. Stay his execution pending final disposition of his petition;

H. Grant such other relief as may be necessary and appropriate.

Dated: January 22, 1988.

[Jurat and Certificate of Service omitted in printing]

[Appendix omitted in printing]

NO. 305495-B

EX PARTE	§	IN THE 230TH DISTRICT COURT
JOHN HENRY SELVAGE, Applicant	§	OF
	§	HARRIS COUNTY, TEXAS

RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has considered the application for writ of habeas corpus and Respondent's answer, as well as the official court records and documents filed in the above-numbered cause. The Court finds that there are no controverted, previously unresolved facts material to the legality of Applicant's confinement which require an evidentiary hearing and recommends that the relief requested be denied. Further, this Court makes the following additional Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Applicant John Henry Selvage was charged by indictment under cause number 305495 for the felony offense of capital murder.

2. John Henry Selvage was convicted by a jury in cause number 305495 for the offense of capital murder; after the jury affirmatively answered the special issues, the court assessed punishment at death by lethal injection.

3. Attorneys John E. Crow and Dennis Kelly were appointed to represent John Henry Selvage in cause number 305495.

4. At the time of Applicant's trial, Texas law precluded jurors from considering parole eligibility in their punishment deliberations, whether or not the trial concerned a capital offense.

5. Defense counsel did not object to the admission of the extraneous offenses on the basis enunciated in ground two of Applicant's application for habeas corpus relief, i.e. that the admission of said offenses at the punishment phase of Applicant's trial violated Applicant's rights under the Eighth and Fourteenth Amendments of the United States Constitution and similar provisions of the Texas Constitution.

6. Defense counsel did not object to the court's punishment charge on the basis that it lacked a limiting instruction, nor did counsel request that such a limiting instruction on the extraneous offenses be included in the court's charge.

7. Prior to trial, defense counsel filed and obtained a ruling on a motion entitled "Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void," in which counsel claimed: (1) that the capital sentencing procedure violates Applicant's right to be free from cruel and unusual punishment; and, (2) that Article 37.071 is vague and indefinite so as to violate Applicant's due process rights. (R. I-50).

8. At no time, either prior to or during trial, did defense counsel file a motion or lodge an objection concerning the complaint

made the basis of Applicant's third ground for relief, i.e. that the Texas capital murder statute is unconstitutional in that it precludes the jury's consideration of defense mitigation evidence as the basis for a sentence less than death and that it actually precluded the presentation of additional mitigating evidence on behalf of Applicant in the instant case.

9. Defense mitigation evidence was offered through two witnesses at the punishment phase of Applicant's trial. Applicant's sister testified concerning Applicant's family background and his accomplishments as a young adult, as well as Applicant's problems with hard drugs following his discharge from the military. (R. VII-2905-2924). Dr. Jose Garcia testified concerning the rehabilitation programs and counseling services available within the Texas Department of Corrections, including a psychological treatment program for drug addiction. (R. VII- 2924-2936).

10. Defense counsel's decision not to present psychiatric testimony as mitigation evidence was a matter of conscious trial strategy since counsel reasonably believed: (1) that a psychiatric exam would not produce evidence of incompetence to stand trial or an insanity defense; (2) that psychiatric testimony would have questionable impact and value since some jurors might perceive said testimony as a mitigating circumstance, while others might perceive it as aggravating; (3) that a psychiatric exam might produce potentially damaging evidence for the defense; and, (4) that the defense could introduce similar mitigating evidence concerning Applicant's drug

addiction and attendant emotional problems through other witnesses without inviting the possibility of State psychiatric rebuttal evidence and/or other problems associated with psychiatric evaluation and testimony. cf. **Buchanan v. Kentucky,** 107 S.Ct. 2906 (1987).

11. Defense counsel did not object to the jury charge or submit a special instruction concerning the jury's consideration of mitigation evidence.

12. In final argument, the prosecution did not argue that Applicant's drug addiction and attendant mental problems should be regarded as aggravating factors requiring a "yes" answer to the special issues. (R. VII-2964-2977).

13. In preparation for trial, defense counsel met with Applicant a few days after the crime and numerous times thereafter.

14. At no time, during the course of the investigation, trial preparation or trial itself, did Applicant give defense counsel any indication that he was anything other than sane at the time he committed the offense and competent to stand trial.

15. Defense counsel made reasonable inquiry of both Applicant and Applicant's family concerning any prior psychological problems or mental illness suffered by Applicant.

16. The information obtained from Applicant and Applicant's family, upon which counsel reasonably relied, corroborated counsels' observations of Applicant and reinforced their opinion that any behavioral and emotional problems suffered by

Applicant: (1) were due to his severe heroin addiction; and, (2) would not provide either an insanity defense or a finding of incompetence to stand trial.

17. Contrary to Dr. Merikangas' opinion, there is every indication based on: (1) counsels' observations of Applicant; (2) Applicant's recollection of the offense; and (3) Applicant's demeanor and lucid, appropriate responses both near in time to the offense and at the trial itself, that mental illness suffered by Applicant at or near the time of the offense and trial, if any, did not manifest itself.

CONCLUSIONS OF LAW

1. Applicant has no constitutional right to voir dire prospective jurors concerning their perceptions about a life sentence under Texas law.

2. The burden of proof in a habeas corpus proceeding is on the applicant. Applicant has wholly failed in his burden of showing: (1) that prospective jurors held misconceptions about the length of life sentences; (2) that the misconceptions, if any, created a bias against the imposition of a life sentence that rendered the jury's sentencing decision in Applicant's case arbitrary and capricious; and, (3) that educating prospective jurors on parole eligibility law would lessen the likelihood of arbitrary and capricious sentencing decisions.

3. Applicant is procedurally barred from raising ground for relief two as he failed to object to the admission of extraneous offenses in the punishment phase of his trial on the basis articulated in ground for

relief two, i.e. that the admission of said extraneous offenses during the penalty phase of his trial violated the Eighth and Fourteenth amendments of the U.S. Constitution and similar provisions of the Texas Constitution.

4. The admission of unadjudicated extraneous offenses in the punishment phase of Applicant's trial is provided for by Texas law and is constitutionally permissible.

5. Applicant's contention, that the trial court should have given the jury a limiting instruction on the extraneous offenses, was raised and rejected by the Court of Criminal Appeals on direct appeal. As such, the claim need not be reconsidered. **Ex parte Acosta,** 672 S.W.2d 470 (Tex. Crim. App. 1984).

6. A limiting instruction on unadjudicated extraneous offenses introduced at the penalty phase of a Texas capital murder trial is not constitutionally required.

7. Despite the lack of a specific limiting instruction on the extraneous offenses admitted at the punishment phase of the trial, Applicant's constitutional rights were adequately protected during the penalty phase of the trial by: (1) the instructions concerning burden of proof given the jury in voir dire and the punishment charge itself; (2) the identification hearings outside the jury's presence; and (3) the opportunity to cross-examine the eye-witness identifications in front of the jury.

8. Applicant is procedurally barred from raising ground for relief three as he failed to object to the Texas capital murder statute at the time of trial on the basis articulated in

ground for relief three, i.e. that the Texas capital murder statute is unconstitutional in that it precluded the presentation of mitigating evidence on behalf of Applicant.

9. Applicant's Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void and the trial court's ruling thereon did not raise *or* preserve for appeal the issues raised in ground for relief three as the motion sets forth a constitutional claim different than that raised in Applicant's third ground for relief.

10. The Texas capital murder scheme adequately narrows the class of death-eligible defendants and sufficiently provides for the jury's consideration of mitigating circumstances. **Jurek v. Texas,** 428 U.S. 262, 274 (1976). *See* **Lowenfield v. Phelps,** No. 86-6867 (del. January 18, 1988).

11. Applicant has wholly failed in his burden of showing: (1) that he was denied an individualized sentencing hearing; and (2) that the jury did not or could not consider all of the evidence introduced at the punishment phase of the trial, including the mitigation evidence presented by the defense.

12. Nothing precluded the jury from grasping the logical relevance of the mitigation evidence introduced by Applicant and giving that evidence effect, i.e. the jury was free to conclude that Applicant's criminal conduct was drug-related, that rehabilitation programs in the Texas Department of Corrections could correct Applicant's drug problem, and that Applicant, once rehabilitated, would no longer constitute a threat to society. *See* **Williams v. Lynaugh,** ___ F.2d ___, No. 88-2131 (5th Cir. Feb. 10,

1988). *Compare* **Penry v. Lynaugh,** 832 F.2d 915 (5th Cir. 1987).

13. Defense counsel were not ineffective in foregoing both psychiatric examination of Applicant and presentation of psychiatric testimony at the punishment phase of Applicant's trial. Counsels' decisions were reasonable, based upon information supplied them by Applicant and Applicant's family. *See* **Wilkerson v. State,** 726 S.W. 2d 542 (Tex. Crim. App. 1986); **Ex Parte Vestal,** 468 S.W.2d (Tex. Crim. App. 1971); **Stone v. State,** 638 S.W.2d 629 (Tex. App. – Houston [1st Dist.] 1982, pet. ref'd.). Additionally, said decisions were a matter of conscious trial strategy.

14. Defense counsel rendered reasonably effective assistance of counsel in the investigation, preparation and trial of Applicant's case.

15. Applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in cause number 305,495-B and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the Applicant's pleadings in cause number 305495-B;

2. all of Respondent's pleadings in cause number 305495-B;

3. the Court's order;

4. the indictment, judgment and sentence in cause number 305495;

5. the affidavit of Mr. John E. Crow;

6. all motions for psychiatric evaluation and all psychiatric reports filed in cause number 305495-B;

7. the entire appellate record in cause number 305495, the Statement of Facts and the transcript and the appellate opinion in cause number 305495;

8. the Applicant's and Respondent's proposed findings of fact and conclusions of law.

THE CLERK is further ORDERED to send a copy of this order to the Applicant.

Signed on this ___ day of MAR 14 1988, 1988.

/s/ Joe Kegaus
JUDGE PRESIDING
[Joe Kegaus]

[Texas Court of Criminal Appeals]

EX PARTE JOHN HENRY SELVAGE — Habeas Corpus Application
WRIT NO. 16,884-02 — from HARRIS County

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

The record reflects that on February 8, 1980, applicant was convicted of the offense of capital murder. The jury answered in the affirmative the special issues submitted pursuant to Article 37.071, V.A.C.C.P. Punishment was assessed at death. Applicant's conviction was affirmed on direct appeal to this Court. Selvage v. State, 680 S.W.2d 17 (Tex.Cr.App. 1984).

In the instant cause, applicant presents five allegations in which he challenges the validity of his conviction. The trial court has entered findings of fact and conclusions of law and recommended the relief sought be denied.

This Court has reviewed the record. The findings and conclusions entered by the trial court are fully supported by the record and the relief sought is denied.

IT IS SO ORDERED THIS THE 18TH DAY OF MARCH, 1988.

PER CURIAM

En Banc

Do Not Publish

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF TEXAS HOUSTON DIVISION

JOHN HENRY SELVAGE, Petitioner	§	
vs.	§	
JAMES A. LYNAUGH, DIRECTOR TEXAS DEPARTMENT OF CORRECTIONS,	§	CIVIL ACTION NO. H-88-0166
Respondent	§	

RESPONDENT'S ANSWER, MOTION TO DISMISS FOR ABUSE OF THE WRIT, MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF, AND OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, hereinafter "the state," by and through the Attorney General of Texas, and files this Answer, Motion to Dismiss for Abuse of the Writ, Motion for Summary Judgment and Supporting Brief, and Opposition to Application for Stay of Execution. In support thereof, the state would respectfully show the court the following:

I.

JURISDICTION

This court has jurisdiction over the subject matter and parties pursuant to 28 U.S.C. §§ 2241, 2254.

II.

DENIAL

The state denies each and every allegation of fact made by Petitioner, hereinafter "Selvage", except those supported by the record and those specifically admitted herein.

III.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below*

The state has lawful custody of Selvage pursuant to a judgment and sentence of the 230th Judicial District Court of Harris County, Texas, in Cause No. 305495, styled *The State of Texas v. John Henry Selvage*. On December 4, 1979, Selvage was indicted in a two paragraph indictment for the offense of capital murder of Albert Garza, while in the course of committing and attempting to commit the offense of robbery of Stephen Ventura, and for the offense of capital murder of Albert Garza, a peace officer known by Selvage to be acting in the lawful discharge of an official duty, to which Selvage entered a plea of not guilty.

Trial began on February 4, 1980, and on February 8, 1980, the jury found Selvage guilty of the capital offense. On February 11, 1980, after a punishment hearing, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987). Accordingly, punishment was assessed at death. Selvage appealed to the Court of Criminal Appeal of Texas, which affirmed on July 11, 1984, *Selvage v. State*, 680 S.W.2d 17 (Tex. Crim. App. 1984), and denied rehearing on October 10, 1984. Selvage did not seek certiorari review.

The trial court subsequently scheduled Selvage's execution for November 14, 1985. Without seeking state habeas corpus relief, Selvage sought a stay of execution in this Court, which was granted on November 8, 1985. On January 26, 1986, Selvage filed his amended petition for writ of habeas corpus, which was denied by the Court on October 6, 1986. Notice of appeal was not timely filed. However, on March 4, 1986, this Court vacated its earlier judgment pursuant to Fed.R.Civ.P. 60(b), but readopted its previous memorandum and order denying habeas corpus relief. *Selvage v. Lynaugh*, No. H-85-6253 (S.D. Tex. Mar. 4, 1986). Selvage appealed this Court's judgment, and the United States Court of Appeals affirmed on July 23, 1987. *Selvage v. Lynaugh*, 823 F.2d 845 (5th Cir. 1987). A petition for writ of certiorari was subsequently denied by the United States Supreme Court on November 2, 1987. *Selvage v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 309 (1987).

While his Rule 60(b) motion was pending in this Court, Selvage filed his first state habeas corpus application in the state convicting court on March 3, 1987. The application was subsequently denied by the Texas Court

of Criminal Appeals. *Ex parte Selvage*, No 16,884-01 (Tex.Crim.App. Mar. 6, 1987).

On December 10, 1987, the trial court rescheduled Selvage's execution for January 27, 1988. On January 21, 1988, Selvage filed his second state habeas corpus application in the trial court. On January 25, 1988, the trial court modified Selvage's death warrant and rescheduled his execution for March 30, 1988. On March 14, 1988, the trial court entered findings of fact and conclusions of law, recommended denial of the writ and forwarded the application to the Court of Criminal Appeals, which adopted the trial court's findings in denying the writ. *Ex parte Selvage*, No 16,884-02 (Tex.Crim.App. Mar. 21, 1988).

B. *Statement of Facts*

The facts surrounding Selvage's commission of capital murder are accurately set forth in the opinion of the Court of Criminal Appeals, *Selvage v. State*, 680 S.W.2d at 18-19, and the opinion by the United States Court of Appeals for the Fifth Circuit. *Selvage v. Lynaugh*, 823 F.2d at 846-47.

IV.

EXHAUSTION

As he has posed his claims in the application, Selvage has exhausted his available state court remedies.

V.

PETITIONER'S ALLEGATIONS

Selvage makes the following allegations in support of his application for writ of habeas corpus:

> 1. The trial court's refusal to allow Selvage to question prospective jurors on their understanding of the amount of time a person would spend in the penitentiary upon receiving a life sentence violated his rights under the Eighth and Fourteenth Amendments;
>
> 2. The introduction of evidence of unadjudicated criminal conduct at the punishment phase of trial violated Selvage's rights under the Eighth and Fourteenth Amendments;
>
> 3. The Texas capital sentencing procedures, without instruction to the jury, do not allow for the consideration of mitigating evidence proffered by the defendant as a basis for a sentence less than death, in violation of the Eighth and Fourteenth Amendments;
>
> 4. In failing to provide a means whereby the jury could give independent mitigating weight to mitigating evidence, the Texas capital sentencing statute precluded the presentation by Selvage of additional mitigating evidence, in violation of the Sixth, Eighth and Fourteenth Amendments; and
>
> 5. Trial counsel rendered ineffective assistance in violation of the Sixth and Fourteenth Amendments by failing to investigate and present evidence of Selvage's mental illness in mitigation of punishment.

VII.

STATE COURT RECORDS

Certified copies of the records of Selvage's trial, appeal and two state writ applications have been provided to the Court

VIII.

MOTION TO DISMISS FOR ABUSE OF THE WRIT

SELVAGE'S SECOND AND SUCCESSIVE HABEAS PETITION CONSTITUTES AN INTOLERABLE ABUSE OF THE WRIT.

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Court states in pertinent part:

> A second or successive petition may be dismissed if . . . new or different grounds are alleged, [if] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This provision applies with equal force to capital murder petitioners under sentence of death. E.g. *Johnson v. Lynaugh*, 821 F.2d 224 (5th Cir.), *stay denied*, ___ U.S. ___, 107 S.Ct. 3248 (1987); *Berry v. Phelps*, 819 F.2d 511 (5th Cir.), *stay denied*, ___ U.S. ___, 107 S.Ct. 3179 (1987). In fact, the Supreme Court has explicitly stressed its applicability.

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been brought years ago are brought forward – often in a piecemeal fashion – only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate – even in capital cases – this type of abuse of the writ of habeas corpus.

Woodard v. Hutchins, 464 U.S. 377, 380, 104 S.Ct. 752, 753-54 (1984) (Powell, J., joined by Burger, C.J., Blackmun, Rehnquist and O'Connor, JJ., concurring).

It has consistently been held in this circuit that the appropriate standard against which to determine abuse of the writ is not whether a petitioner intended to bypass an issue at the time of the earlier petition, but "whether he withheld it without legal excuse when he filed his earlier petition." *Hamilton v. McCotter*, 772 F.2d 171, 176 (5th Cir. 1985), *quoting Jones v. Estelle*, 722 F.2d 159, 163 (5th Cir. 1983) (en banc), *cert denied sub nom. Jones v. McKaskle*, 466 U.S. 976, 104 S.Ct. 2356 (1984). Legal excuse may exist if, after the previous proceedings, there is a change in the law that makes the claim possible or the petitioner becomes aware or chargeable with knowledge of the asserted facts on which the new claim is based. *Hamilton v. McCotter*, 772 F.2d at 176. Where a petitioner has been represented by competent counsel in a prior habeas proceeding, he is held to possess knowledge of potential grounds for relief that is chargeable to counsel. *Moore v. Butler*, 819 F.2d 517, 519 (5th Cir. 1987).

Selvage has been represented by counsel since well before his February, 1980 trial. There is **no legitimate reason** why, if Selvage believed that the Texas capital sentencing statute was constitutionally infirm because it did not mandate instruction on consideration of mitigating evidence or did not allow the jury to consider evidence of his mental condition, that the admission of unadjudicated criminal conduct was constitutionally impermissible, or that the Constitution mandated questioning of jurors on parole considerations, he did not raise such claims in his earlier federal petition.

In highly conclusory fashion, Selvage claims that his abuse of the writ should be excused because prior habeas counsel raised in his first habeas petition only issues that he raised on direct appeal "without undertaking any investigation of the case" and, after relief was denied, counsel did not appeal this Court's judgment.[1] It is now settled that ineffective assistance of habeas counsel may constitute legal cause for an abuse of the writ, *see Jones v. Estelle*, 722 F.2d at 167. Selvage's prior habeas counsel, Mr. Don Rogers, demonstrated a thorough, vigorous, diligent and intelligent attack on the constitutional validity of his conviction and sentence.[2] Selvage wholly fails to

---

[1] Selvage did assert as support for his Rule 60(b) motion in his earlier federal habeas action that prior habeas counsel was ineffective, but solely on the ground that counsel failed to timely file notice of appeal, thus depriving Selvage of the opportunity to appeal this Court's denial of the writ. Of course, the granting of the Rule 60(b) motion rendered that claim of ineffective assistance moot.

[2] In its March 4, 1987, order granting Selvage's Rule 60(b) motion, but denying leave to amend the petition, this Court acknowledged prior counsel's competence in formulating Selvage's attack on his conviction:

> Selvage's original counsel in this habeas action filed a detailed petition for writ of habeas corpus and later filed a first amended petition. The first amended petition raises four basic constitutional attacks on his conviction. It cites at length from the transcript of Selvage's murder trial and from the applicable State and constitutional law. This Court will not grant Selvage leave to amend his petition simply because new counsel may want to raise additional grounds for habeas relief.

Selvage v. Lynaugh, No. H-85-6253, March 4, 1987, order, at 4-5.

demonstrate that counsel acted unreasonably in not presenting his current claims in his prior petition. Texas law clearly does not allow the jury to consider, and consequently a defendant to inquire about in *voir dire*, parole considerations. Likewise, Texas' restriction on *voir dire* has been long upheld as a constitutional matter in this circuit. *See O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1015 (1984); *Moreno v. Estelle* 717 F.2d 171 (5th Cir. 1983), *cert. denied*, 466 U.S. 198, 104 S.Ct. 2353 (1984).[3] The introduction of unadjudicated offenses during the punishment phase of trial has long been upheld as a matter of state law, and has been upheld as a matter of constitutional law. *Milton v. Procunier*, 744 F.2d 1091 (5th Cir. 1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050 (1985); *Autry v. Estelle*, 706 F.2d 1394, 1406 n.5 (5th Cir. 1983). The constitutionality of the Texas capital sentencing statute has been long-established, *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), and the failure to instruct the jury on its consideration of mitigating evidence has been long held in this circuit to be constitutionally permissible. *Esquivel v. McCotter*, 777 F.2d 956 (5th Cir. 1985); *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982). Thus, assuming the applicability of the standard set forth

---

[3] Selvage's assertion that the panel opinion in *King v. Lynaugh*, 828 F.2d 257 (5th Cir.), *reh. en banc granted*, 828 F.2d 269 (5th Cir 1987), constitutes a change in the law, thereby excusing his failure to earlier assert this claim, is misplaced. Under the rules of the Fifth Circuit, the granting of rehearing en banc operates to vacate the panel opinion. *See* Appendix A, attached hereto. Therefore, because the panel opinion has no precedential value, it cannot constitute a change in the law.

in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), in gauging the effectiveness of habeas counsel, *see Johnson v. Cabana*, 818 F.2d 333, 340-41 (5th Cir. 1987); *Daniels v. Blackburn*, 763 F.2d 705, 710 (5th Cir. 1983), Selvage does not demonstrate deficient performance on habeas counsel's part. Because there is no constitutional requirement that competent counsel file every non-frivolous claim on direct appeal, *Barnes v. Jones*, 463 U.S. 745, 103 S.Ct. 3308 (1983), *a fortiorari*, no such right can exist to excuse piecemeal litigation in collateral review, a proceeding even further removed from direct appeal and which has no constitutional footing. *Cf. Pennsylvania v. Finley*, ___ U.S. ___, 107 S.Ct. 1990 (1987).

Moreover, Selvage cannot demonstrate prejudice resulting from habeas counsel's performance. As set forth in section IX A, *infra*, questioning of prospective jurors on parole considerations is not constitutionally required. As set forth in section IX B, *infra*, review of Selvage's Eighth and Fourteenth Amendment claim that unadjudicated criminal conduct is inadmissible in the punishment phase of a capital murder trial is procedurally barred, and, in any event, under the law of this circuit Selvage cannot prevail on such a claim. As set forth in section IX C, *infra*, Selvage's two interrelated claims that the Texas capital sentencing procedures are constitutionally defective because they do not allow for the presentation and consideration of mitigating evidence are barred under the procedural default doctrine, and further are contrary to the established law of the circuit. Finally, as set forth in section IX D, *infra*, counsel's decision to present lay testimony regarding Selvage's drug history and the availability of rehabilitation programs, rather than obtain a

psychiatric examination and produce psychiatric testimony, was a sound trial strategy, and Selvage's claim of ineffective assistance of counsel is frivolous. Hence, because Selvage does not and cannot demonstrate any deficiency on the part of prior counsel or any prejudice resulting from counsel's failure to raise his current claims in his prior petition, any allegation of ineffective assistance of counsel to excuse abuse of the writ fails *as a matter of law. Milton v. McCotter*, 765 F.2d at 437.

IX.

MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF

* * *

C.

THE TEXAS CAPITAL SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.

Selvage next argues that the Texas capital sentencing statute precludes jury consideration of relevant mitigating evidence that might serve as a basis for a sentence less than death. He contends that because the jury is limited to answering the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b), and because the state does not require an instruction on how to consider mitigating evidence, the jury could fail to see the relevance of some evidence that might persuade it to not impose the death penalty. Thus, the evidence would

not be taken into consideration during punishment deliberations, in violation of the holdings of *Lockett v. Ohio*, 438 U.S. 536, 98 S.Ct. 2954 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982), and their progeny. He relies on the granting of the petition for writ of certiorari in *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 221 (1987),[6] and the recent Fifth Circuit case of *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), in which the same issue is raised, to support his contention.

1. Consideration of Selvage's claim is barred by his failure to object on this basis at the time of trial.

Prior to trial, Selvage filed a motion to have the Texas capital sentencing statute declared unconstitutional on the basis that it 1) violated his right to be free from cruel and unusual punishment, and 2) was vague and indefinite so as to violate his rights to due process. Selvage did not object to the court's charge at the punishment phase of trial, did not submit a proposed instruction on mitigating evidence, or otherwise object to the capital sentencing statute on the grounds now urged. When he presented these claims in his application for state writ of habeas corpus, the state courts noted that his current claims did not comport to his objection to the validity of the statute voiced at trial and, consequently, the courts imposed their

---

[6] The precise question upon which the Supreme Court granted certiorari is "[w]hether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme." *See* relevant portion of petition in *Franklin*, attached hereto as Appendix B.

contemporaneous objection rule and held that review of the merits of the claims were barred. *Ex parte Selvage*, No. 16,884-02 (March 21, 1988).

When a defendant fails to follow a state procedural rule and review of a claim of error is refused by state courts, federal habeas review of the claim is barred, unless he can demonstrate cause and prejudice for his failure. *Murray v. Carrier*, 477 U.S. ___, ___, 106 S.Ct. 2639, 2648 (1986); *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506 (1977); *Streetman v. Lynaugh*, 835 F.2d 1519, 1520-21 (5th Cir.), *stay denied*, ___ U.S. ___, 108 S.Ct. 588 (1988); *Thompson v. Lynaugh*, 821 F.2d at 1062. Selvage has demonstrated no cause for his failure to timely object on the grounds now raised, nor has he alleged any prejudice. Accordingly, his claims should be dismissed without reaching the merits.

2. The granting of certiorari in *Franklin* does not entitle Selvage to a stay of execution.

Moreover, the mere granting of the petition for writ of certiorari does not change the law of this circuit so that Selvage would be entitled to a stay of execution. *Streetman v. Lynaugh*, 835 F.2d 1519, 1520 (5th Cir.), *stay denied*, ___ U.S. ___, 108 S.Ct. 588 (1988); *cf. Johnson v. McCotter*, 804 F.2d 300 (5th Cir. 1986); *Berry v. Phelps*, 795 F.2d 504 (5th Cir. 1986). This court is bound by earlier precedent, which has held that the Texas capital punishment statute is constitutional. *Penry v. Lynaugh*, 832 F.2d at 926; *see Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976).

In his attempt to persuade this court to grant a stay of execution, Selvage blatantly misrepresents the Supreme Court's action in *Williams v. Lynaugh*, 837 F.2d 1294 (5th Cir.), *stay granted*, ___ U.S. ___, 108 S.Ct. ___ (1988). Selvage asserts that the Court's action in that case was unanimous (Petitioner's Supplemental Memorandum at 2). As this court is well aware, formal dissent in such cases is extremely rare and the mere fact that no formal dissent is noted does not mean that all of the justices agreed to the action. This case is in no different posture than was *Streetman v. Lynaugh, supra*, in which the Supreme Court denied the requested stay of execution.

3. Selvage is not entitled to relief on the ground that the Texas capital sentencing statute is unconstitutional.

Even if the court were to address the merits of Selvage's claim, he is not entitled to relief. To pass constitutional scrutiny, a state's capital sentencing procedure must allow for individualized sentencing. *California v. Brown*, ___ U.S. ___, ___, 107 S.Ct. 837, 839 (1987). This is accomplished by requiring that the defendant be permitted to introduce and the sentencing authority to consider, as a mitigating factor, any evidence relevant to "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*; *Lockett v. Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964. Evidence is relevant to the sentencing considerations if it has some bearing on the defendant's personal responsibility and moral guilt for his crime, or on whether he will constitute a future threat. *Tison v. Arizona*, ___ U.S. ___, ___, 107 S.Ct. 1676,

1683 (1987); *California v. Brown*, ___ U.S. at ___, 107 S.Ct. at 839; *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3375 (1982); *Lockett v. Ohio*, 438 U.S. at 605, 98 S.Ct. at 2965.

The Texas statute clearly permits a defendant to introduce any relevant mitigating evidence that he wants the jury to consider in making its punishment decision. The statute does not contain a list of defined mitigating factors, as did the Ohio statute in *Lockett*, or the Florida statute in *Hitchcock v. Dugger*, ___ U.S, ___, 107 S.Ct. 1821 (1987), both of which were held to preclude introduction and consideration of certain mitigating evidence. Instead, any evidence relating to the defendant's character or to any of the circumstances of the offense can be put before the jury.

Furthermore, the special issues allow for jury consideration of the proffered evidence. The first special issue asks the jury to determine whether the defendant acted deliberately and with the reasonable expectation that the death of the victim or another would result. Evidence about the circumstances surrounding the murder is relevant to determining a defendant's ability to deliberately act, as is evidence about possible personality disorders or, in Selvage's case, drug addiction. The jury can readily grasp the significance of such evidence to the first special issue, and Selvage was not impeded in his ability to present or argue the relevance of such evidence to the jury.

Likewise, the second special issue concerns whether there is a probability that the defendant will commit future acts of violence that would constitute a continuing

threat to society. Evidence of the defendant's past behavior, his upbringing, his mental and emotional development, and his prospects for rehabilitation is relevant to the jury's consideration of this issue. Again, this is the very kind of evidence that Selvage offered in mitigation at his trial through the testimony of his sister and that of Dr. Jose Garcia. The fact that the jury was not persuaded indicates only that it did not ascribe sufficient weight to the evidence to raise a reasonable doubt as to the answers to the special issues, not that the evidence was excluded from consideration.

Further, Selvage's claim that potentially mitigating evidence of his alleged psychosis was withheld because it could have been used as evidence to *support* imposing a death sentence is unavailing. The Constitution does not require that evidence introduced in a capital-sentencing hearing be exclusively mitigating or aggravating. That both the state and the defendant might be able to use the same evidence to support opposing contentions does not offend the Constitution, as long as the jury is not precluded from considering the mitigating aspects, if any, of the evidence. Evidence relating to punishment is circumstantial, and like any circumstantial evidence, it is susceptible of more than one interpretation. It is for the sentencer to determine what weight each aspect of the evidence receives. *See Eddings*, 455 U.S. at 114-15, 102 S.Ct. at 877; *Barclay v. Florida*, 463 U.S. 939, 961 n.2, 103 S.Ct. 3418, 3432 n.2 (1983) (Stevens, J., concurring) (neither *Lockett* nor *Eddings* held that any particular weight must be given by the sentencer to mitigating evidence. Selvage has failed to identify any relevant mitigating

evidence that the jury was, or would have been, precluded from considering under the Texas statute.

Moreover, Selvage's assertion that the statute precluded admission of mitigating evidence in existence at the time of trial is factually incorrect. His newly discovered "psychosis" did not manifest itself before or at the time of Selvage's trial such that counsel should have been aware of its existence. Counsel inquired of both Selvage and his family as to prior mental problems, to no avail. Counsel's observance of Selvage, both in interviews conducted before trial and at trial, belied the existence of any mental problems, and counsel's opinion that Selvage did not suffer from mental illness is fully corroborated by a reading of Selvage's lucid, intelligent responses during examination in pretrial hearings (SF III 775-837).[7]

---

[7] Selvage's asserts that the trial court's and the Court of Criminal Appeals' factual determination that his mental illness, if any, did not manifest itself at the time of the offense and trial is not entitled to a presumption of correctness, referring to the finding as "lay inferences" by the state district judge based upon "lay observances" by his trial counsel. Selvage's elevation of a psychiatrist's opinion, rendered over eight years after the fact, that Selvage's psychosis was readily apparent at the time of the offense and trial over the observances of counsel and the court made at the time of the offense and trial of no outward indications of mental illness, observances that are buttressed by the trial record revealing a lucid and responsive Selvage, amounts to nothing more than a disagreement with the credibility choice made by the state courts. Presented with conflicting evidence, the trial judge was obligated to make such a choice. Moreover, a hearing by affidavit, as was conducted by the state courts, constitutes a "hearing" within the meaning of 29 U.S.C. §2254, *Smith v. Estelle*, 711 F.2d 877 (5th Cir.), *cert. denied*, 466 U.S. 906, 104 S.Ct. 1685 (1984), and because the state court's finding is supported in the record, it must be accorded a presumption of correctness.

When stripped of its embellishments, Selvage's claim is simply that a capital-sentencing statute *must* allow the jury to dispense mercy, even though it finds that the evidence warrants the death penalty. The Supreme Court has recognized that the occasional granting of mercy to a defendant does not violate the constitution. *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937 (1976). The Court has also approved the Texas statute while noting that the death penalty is mandatory if the jury answers all of the special issues affirmatively. *Jurek v. Texas*, 428 U.S. at 278, 96 S.Ct. at 2959 (White, J., concurring); *see also Lowenfield v. Phelps*, ___ U.S. ___, ___, 108 S.Ct. 546, 554 (1988). And in *California v. Brown*, ___ U.S. ___, 107 S.Ct. 837 (1987), the Court expressly held that there is no constitutional violation in giving an instruction that tells the jury it is not to be swayed in making its capital-sentencing decision by sentiment or sympathy. Such factors should not "play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor." *Id.* at ___, 107 S.Ct. at 840. Thus, Selvage's claim is without merit.

XI.

SELVAGE RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL.

As his final claim for relief, Selvage contends that his trial attorneys rendered ineffective assistance. It is now well established that claims of ineffective assistance of counsel are to be reviewed under the two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *See Burger v. Kemp*, ___ U.S. ___, 107 S.Ct. 3110

(1987); *Darden v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2465 (1986). To meet this standard, a criminal defendant must demonstrate:

> First . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. In reviewing such claims, "judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S.Ct. at 2065, and every effort must be made to eliminate "the distorting effect of hindsight." *Id.*, 104 S.Ct. at 2066. Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and a defendant must overcome the presumption that the "challenged action 'might be considered sound trial strategy.'" *Id.*

To demonstrate prejudice the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. When a defendant challenges the death sentence, the question is "whether there is a reasonable probability that, absent the errors, the sentencer -- including the

appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069.

It is not sufficient that the habeas petitioner merely allege a deficiency on the part of counsel; he must affirmatively plead prejudice in his petition. *Hill v. Lockhart*, ___ U.S. ___, ___, 106 S.Ct. 366, 371 (1986); *Manning v. Blackburn*, 786 F.2d 710, 712 (5th Cir. 1986). Absent such pleading, a habeas petitioner is not entitled to a federal evidentiary hearing on his claim. *Id.* The claim may be disposed of for either reasonable performance of counsel or lack of prejudice, and if one is found dispositive it is not necessary that the court address the other. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069-70.

Selvage's allegation is not that counsel acted unreasonably in representing him. On the contrary, he contends that the culprit is the Texas capital sentencing statute. He asserts that, even if the statute does not preclude the jury from considering some types of mitigating eveidence, (sic) counsel reasonably perceived that it did so. Consequently, counsel forewent investigation and presentation of evidence of Selvage's mental condition, resulting in a death sentence that was imposed in violation of the Eighth Amendment's demand for reliability. Because the ineffectiveness in this case resulted from the state's interference with counsel's ability to provide adequate representation, Selvage contends that there is no need for him to demonstrate prejudice.

Selvage relies on the affidavit of one of his trial attorneys, Honorable John Emmett Crow, which he submitted along with his second application for state writ of habeas corpus. In the affidavit, Crow stated that he and his co-counsel decided not to investigate Selvage's mental background because they perceived that, after the state's presentation of rebuttal psychiatric evidence, the jury would be forced to consider such evidence as aggravating with respect to the second special issue, and that the evidence would not be sufficient to raise a reasonable doubt as to the issue on deliberateness. Crow further stated that if the Texas statute had allowed the jury to impose a life sentence even though it found beyond a reasonable doubt that the special issues should be answered affirmatively, counsel would have undertaken an investigation of Selvage's mental history.

Selvage's claim that counsel was ineffective in this regard rests on the premise that the Texas statute must allow the jury to arbitrarily dispense mercy. As demonstrated in Section IX C, *supra*, the Constitution does not require that the jury be given that option. *California v. Brown*, ___ U.S. at ___, 107 S.Ct. at 839; *see also Jurek v. Texas*, 428 U.S. at 278, 96 S.Ct. at 2959 (White, J., concurring) (noting that death penalty *must* be imposed if the jury answers the special issues affirmatively). By necessity, counsel's decision to forego developing certain evidence intended solely to elicit mercy is not rendered unreasonable merely because there is no constitutional or statutory right to the assessment of a life sentence based on mercy. Such a decision is clearly not unreasonable when, as counsel correctly predicted, the state is free to

respond with psychiatric evidence of its own in aggravation. *See Buchanan v. Kentucky*, ___ U.S. ___, 107 S.Ct. 2906 (1987).

Examined in this light, counsel's strategic decision not to inquire in depth into Selvage's mental health history was clearly reasonable. From observation of Selvage and conversations with Selvage and his family, counsel had no reason to suspect that there was evidence of mental illness or disease that could have been used to support a sentence less than death. Moreover, the state court concluded that there was no evidence that Selvage manifested any symptoms of psychosis at the time of trial. The state court's findings in this regard are entitled to a presumption of correctness in these proceedings. *See* footnote 7, *supra*. Counsel's decision to forego further investigation into Selvage's mental condition was reasonable under these curcumstances. (sic) *Burger v. Kemp*, ___ U.S. ___, 107 S.Ct. 3114 (1987). On the other hand, counsel was aware of Selvage's drug problem, and developed a strategy for the punishment phase of the trial of presenting evidence, through the testimony of Selvage's sister, of his drug abuse and its effects on his personality. Further, counsel relied on the testimony of Dr. Jose Garcia about the facilities for drug treatment and rehabilitation at the Texas Department of corrections to demonstrate that Selvage's drug problem could be treated and he would no longer be a threat to society. By presenting mitigating evidence in this fashion, rather than through the testimony of psychologists or psychiatrists, counsel brought to the jury's attention evidence that would allow negative answers to the special issues without inviting rebuttal by

state psychiatrists.[8] Under the totality of the circumstances, counsel's strategy was reasonable and selvage's present claim amounts to nothing more than 20-20 hindsight. His claim of ineffective assistance is meritless.

WHEREFORE, PREMISES CONSIDERED, the state prays that the application for writ of habeas corpus be dismissed, or, in the alternative denied.

[Jurat and Certificate of Service omitted in printing]

[Appendices omitted in printing]

---

[8] Selvage was arrwsted (sic) in New Orleans in August, 1979, and was indicted on December 4, 1979, over two months after the Fifth Circuit's opinion in *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979). It is reasonable to assume that had a psychiatric examination of Selvage been ordered, appropriate warnings in compliance with *Smith* would have been given.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN HENRY SELVAGE, Petitioner	§	
VS.	§	CIVIL ACTION
JAMES LYNAUGH, Director, Texas Department of Corrections,	§	NO. H-88-166
Defendant.	§	

ORDER

Petitioner contends that because the trial court did not permit defense counsel to inquire about their understanding of what a life sentence means under Texas law, a stay of execution must be granted pending *en banc* reconsideration of *King v. Lynaugh*, 828 F.2d 257, reh'g *en banc* granted, 828 F.2d 269 (5th Cir. 1987). There is no procedural default in raising this issue. *See Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

The current law in this circuit is that the refusal by a Texas trial court to allow a capital defendant to conduct limited voir dire on whether jurors held misconceptions about Texas parole law mandates resentencing. *Id.* at 260. Judge Edith Jones wrote a logical vigorous dissent. *Id.* at 765-9. The Court has examined the record in Mr. Selvage's, case. It indicates that trial counsel attempted to inquire about the potential juror's understanding of what a life sentence means. Counsel's attempts were assisted in

some respects by the trial judge, *see* R. 1060-61, 1093-95, and may have been thwarted once. R. 934.

Following *King v. Lynaugh*, this Court stays Mr. Selvage's execution pending *en banc* reconsider of *King*. If the *en banc* Court decides that *King* was correctly decided, this Court may order that Mr. Selvage be resentenced. If the *en banc* Court reverses the panel decision, this Court will lift the stay of execution.

Petitioner urges this Court to stay his execution because issues presented to the United States Supreme Court in *Franklin v. Lynaugh, cert granted*, Oct. 9, 1987, No. 87-5546, are presented in this case. *Franklin* is still the law in this Circuit and this Court, bound by Fifth Circuit and Supreme Court precedent, will not stay petitioner's execution based on the granting of certiorari. *Streetman v. Lynaugh*, 835 F.2d 1534 (5th Cir. 1988), *see also Penry v. Lynaugh*, 832 F.2d 915, 924-6 (5th Cir. 1987) (upholding Texas capital sentencing statute on grounds presented here while recognizing that certiorari has been granted in *Franklin*). The Court would not grant a stay based on *Franklin* grounds.

Petitioner also claims that he received ineffective assistance of counsel because counsel failed the present evidence of Mr. Selvages apparent mental instability to mitigate a possible death sentence. Since a presentation of such evidence is precluded by Texas law, see *Penry, supra*, this court finds that Mr. Selvage was not denied effective assistance of counsel when counsel failed to make inquiry regarding mitigating evidence. The claim of ineffective assistance of counsel must be denied because counsel's performance was not deficient based on the law at the

time of trial, and Petitioner has failed to show the requisite prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

Finally, Petitioner contends that the admission of unreliable, unadjudicated crimes evidence during the punishment phase of the trial violated his constitutional rights. This contention was rejected in *Williams v. Lynaugh*, 814 F.2d 205 (5th Cir. 1987), *cert. denied*. In *Williams* that Court of Appeals held that putting unadjudicated, possibly unreliable, evidence before the jury during the punishment phase of a capital trial did not violate his constitutional rights. *See also Milton v. Procunier*, 744 F.2d 1091 (5th Cir. 1984). Petitioner's contention is meritless. *See also Thompson v. Lynaugh*, 821 F.2d 1054 (5th Cir. 1987).

Petitioner's motion to proceed *in forma pauperis* is GRANTED. For the reasons stated above Petitioner's application for a stay of execution is GRANTED.

Done at Houston, Texas, this 25th day of March, 1988.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(caption omitted in printing)

FINAL JUDGMENT

For the reasons stated in the Court's order signed this day, Petitioner's claims except those based on *King v. Lynaugh* are DISMISSED.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 25th day of March, 1988.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(caption omitted in printing)

ORDER STAYING EXECUTION

On application by Petitioner John Henry Selvage for a stay of execution of the sentence of death imposed upon him by the District Court of Harris County, Texas, 230th Judicial District, on March 12, 1980, and presently scheduled to be carried out on March 30, 1988 (after midnight March 29, 1988), for the reasons stated in the Court's ordered (sic) entered this day, it is

ORDERED that Petitioner's application for stay of execution is hereby GRANTED and petitioner's execution

is hereby stayed pending further order of this Court. It is further

ORDERED that Petitioner remain in custody of the Director of the Texas Department of Corrections pending further order of this Court. It is further

ORDERED that the Clerk of this Court give immediate telephonic and written notice to the Director of the Department of Corrections, to Governor Bill Clements, and to Jim Mattox, Attorney General of Texas, that the Petitioner's execution is stayed by order of this Court and that a certified copy of this order be sent by the Clerk to those persons.

Done at Houston, Texas, this 25th day of March, 1988.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT
JUDGE

John Henry SELVAGE,
Petitioner-Appellee-Appellant,

v.

James A. LYNAUGH, Director, Texas Department of Corrections,
Respondent-Appellant-Appellee.

No. 88-2278

United States Court of Appeals,
Fifth Circuit.

March 28, 1988.

[842 F.2d 89]

Before POLITZ, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

In this, John Henry Selvage's second habeas trip to the federal courts, the United States District Court has granted a stay of his execution scheduled to be carried out before sunrise on March 30, 1988. The State of Texas asks this court to vacate that stay of execution. Selvage, in turn, requests a stay pending appeal of his dismissed claims, should we vacate the stay granted by the district court. Despite the shortness of time we will describe the history of this case and then turn to each of Selvage's claims. We conclude that we must vacate the stay and deny Selvage's request for stay because we are persuaded that Selvage's only substantial claim has not been preserved for review.

I

Selvage was convicted of the capital murder of Albert Garza, a peace officer, while attempting to rob Stephen Ventura, a jeweler. The jury found Selvage guilty on February 8, 1980, and on February 11, answered affirmatively the requisite interrogatories submitted pursuant to Article 37.071, Tex.Code Crim.Proc. (Vernon Supp. 1988), the Texas capital sentencing provision. The conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on July 11, 1978. *Selvage v. State*, 680 S.W.2d 17 (Tex.Crim.App.1984). Selvage did not petition for a writ of certiorari.

With his execution scheduled for November 14, 1985, Selvage sought a stay of execution from the United States District Court for the Southern District of Texas. That stay was granted on November 8, 1985. After considering Selvage's amended petition, the district court denied relief and, after what we later described as a "rankle over notice of appeal," we affirmed the denial of habeas relief. *Selvage v. Lynaugh*, 823 F.2d 845 (5th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 309, 98 L.Ed.2d 268 (1987). When the trial court rescheduled his execution for January 27, 1988, Selvage filed his second application for state habeas relief. In this state habeas petition, Selvage asserted four bases for relief:

(1) the state trial judge denied Selvage due process by refusing inquiry during the voir dire of the panel concerning veniremens' understanding of a life sentence under Texas law;

(2) the admission into evidence of "unreliable, unadjudicated crimes evidence during the penalty phase" was contrary to the eighth and fourteenth amendments;

(3) failure of the capital sentencing procedure in Texas to allow consideration by the jury of a defendant's evidence of mitigation contrary to the eighth and fourteenth amendments; and

(4) failure of Texas capital sentencing procedure to provide a means for the jury's independent consideration of mitigating evidence.

The execution then was rescheduled for March 30, 1988, and without an evidentiary hearing, the state trial court on March 14, 1988, denied a stay with detailed

findings of fact and conclusions of law. The Texas Court of Criminal Appeals adopted the trial court's findings and denied the writ. *See Ex Parte Selvage*, No. 16, 884-02, Tex. Crim.App. (March 21, 1988).

In his application for a stay of execution and writ of habeas corpus filed in the United States District Court, Selvage made the same arguments, adding that trial counsel had failed to investigate and present evidence of Selvage's mental illness, depriving Selvage of effective representation required by the sixth and fourteenth amendments. While the last contention is arguably new, the state concedes that Selvage has exhausted his state remedies. However, the state moved to dismiss for abuse of the writ, arguing that all of Selvage's present arguments could have been made in his first habeas petition.

The district court granted both Selvage's motion to proceed in forma pauperis and his application for a stay of execution. The stay rested solely on Selvage's first claim that he was denied the right to conduct voir dire regarding veniremens' understanding of Texas parole law. The district court rejected all other grounds, denied a certificate of probable cause as to them, but did not address the state's contention that Selvage had abused the writ. Selvage has filed a cross-appeal and requests that we issue a certificate of probable cause and a stay pending that appeal.

II

[1] Our standard for review of a stay is essentially the same as the measure for granting a stay. We must consider:

(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *O'Bryan v. McKaskle*, 729 F.2d 991, 993 (5th Cir.1984); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir.1982), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984); *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir.1982).

In a capital case "while the movant need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e. the other three factors] weighs heavily in the favor of granting the stay." *O'Bryan v. McKaskle*, 729 F.2d at 993 (quoting *Ruiz v. Estelle*, 666 F.2d at 856.)

Celestine v. Butler, 823 F.2d 74, 77 (5th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 6, 97 L.Ed.2d 796 (1987); *see also Streetman v. Lynaugh*, 835 F.2d 1521, 1524 (5th Cir.1988).

III

[2] The district court rested its stay of execution upon *King v. Lynaugh*, 828 F.2d 257, *reh'g en banc granted*, 828 F.2d 269 (5th Cir.1987), concluding that the panel in *King* had found a constitutional right to inquire into veniremens' understanding of parole. To the extent the district court footed its grant of a stay upon its view that the panel opinion was binding, it was in error. The grant of a rehearing en banc vacates the panel opinion, which

thereafter has no force. The controlling law must be stated without giving effect to that panel opinion. As we will explain, we are not persuaded that Selvage has shown the requisite likelihood of success on this issue.

[3] Before turning to the merits of the claim, we pause to explain that we find no writ abuse in the failure of Selvage to include this claim in his earlier federal habeas petition. The question is whether Selvage withheld the claim "without legal excuse." *Daniels v. Blackburn*, 763 F.2d 705, 707 (5th Cir.1985).

> Legal excuse exists if "new claims[s] [are] based on facts or legal theories about which [the petitioner] had no knowledge when prosecuting his prior habeas petition." . . . "A petitioner can prove that he has not abused the writ by showing, for example, [that] new facts have arisen since his prior petition, or that the law has changed in some substantive manner in the interim."

Id. (citations omitted).

The legal basis for the argument that Selvage was denied a constitutional right to inquire into the veniremens' understanding of parole enjoyed virtually no support in this circuit before the panel opinion in *King v. Lynaugh*, issued approximately six years after his trial and after our decision affirming the denial of his first federal petition for habeas relief. *King*, although short lived, presented a significant change in our circuit's law. We are persuaded then that this claim should not be dismissed for abuse of the writ; or in any event, that Selvage has a likelihood of avoiding the state's charge of writ abuse. It follows that whether this claim will support a stay

requires that we ask whether the accused restriction on voir dire presents a serious question under our law.

We are not persuaded that a substantial legal question is presented. In *Milton v. Procunier*, 744 F.2d 1091 (5th Cir.1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985), we considered the type of information about post-sentence relief a defendant is entitled to have explained to the jury. The state trial judge in *Milton* gave a pattern instruction not to consider possible action by the Board of Pardons and Paroles or the governor or to consider how long the defendant would be required to serve. We observed that the instruction "to some degree narrows the inquiry into future dangerousness. It is the obverse of *Ramos*." 744 F.2d at 1100 n.10.[1] Under Texas law a jury may not consider the possibility of parole in its deliberation. We have rejected the assertion that this Texas rule is unconstitutional. *O'Bryan v. Estelle*, 714 F.2d 365, 388-89 (5th Cir.1983), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1015-16, 79 L.Ed.2d 245 (1984).

If the Texas practice of instructing juries not to consider the effect of parole is sound the refusal to explore veniremens' "understanding" of the subject is an a fortiori case. The point is that the inquiry into parole matters in the selection of a jury cannot be required so long as the state may instruct the selected jury that it cannot consider the subject at all. A contrary assertion borders on the frivolous.

---

[1] *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)(the Briggs instruction).

The decision of the Supreme Court in *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) is not to the contrary. In *Turner*, the Court held that a capital defendant accused of an interracial crime may on voir dire have the veniremen told the race of the victim and questioned about racial bias. The court observed that in such cases "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Id.*, 106 S.Ct. at 1687. The Court plainly acted upon the reality of the significant risk of racial bias that could infect the entire proceedings. The Court also has made plain that its efforts to excise racial bias is driven by intrinsic as well as instrumental concerns about accurate decisionmaking. *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). Of course, Turner was entitled to a jury instruction that the race of the victim and the defendant would not be considered.

[4] In sum, *Turner* is inapposite, and in the face of our controlling cases we cannot conclude that refusing to examine veniremen about their understanding of parole or their understanding of a life sentence, a subject they later will be told they are not to consider at all, denied Selvage any right secured by the Constitution.

IV

Selvage next quarrels with the admission of "unadjudicated crime evidence during the penalty phase" of his trial. At the penalty phase, the court admitted the state's offer of two prior federal convictions – possession of a

controlled substance and conspiracy to commit bank robbery. In addition, the state offered the testimony of a New Orleans police officer that Selvage had attempted to escape from a Louisiana state institution, injuring himself in the process. The state also produced two witnesses whose testimony at the penalty phase implicated Selvage in a July 6, 1979, robbery and murder at a convenience store. The store clerk testified that Selvage and an accomplice had demanded money from the register and ordered the clerk to a back room. After hearing gunshots, the clerk returned from the back room to find a customer who had been shot. That testimony was corroborated by a customer who had accompanied the customer who was killed.

[5] Selvage contends that admission of this evidence rendered his sentence unreliable and unfair, that because he was not convicted he is presumed innocent of these crimes, and that the jury never was told that before it could consider this evidence, it had to be persuaded beyond a reasonable doubt that he was guilty of the offenses. The state points out that no objection to admission of this evidence was made at trial, and that both the state trial and appellate courts had relied upon the failure to object as a procedural bar. It follows that this claim must be tested under the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), and *Engle v. Issac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). That is, Selvage must show legal excuse – good cause for the default and resulting prejudice. Selvage, however, makes no such showing, and we find in the record no justification for his failure to object. Thus, his objection is procedurally barred.

[6] In any event, we are persuaded that the state's evidence was admissible at the penalty phase and denied Selvage no right due him. This evidence was admitted only in the punishment phase and thus did not risk an erroneous finding of guild. Furthermore, at the penalty phase, the jury must consider the issue of the future dangerousness of Selvage, and this evidence was directly relevant to that inquiry. Indeed, in *Barefoot v. Estelle,* the Supreme Court rejected the argument that psychiatric testimony regarding future dangerousness was too unreliable. The Court pointed out that testimony by psychiatrists undoubtedly increased the likelihood of the death sentence, but rejecting the evidence on that basis would undermine *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). *See Barefoot v. Estelle*, 463 U.S. 880, 896-98, 103 S.Ct. 3383, 3396-97, 77 L.Ed.2d 1090 (1983); *see also Williams V. Lynaugh*, 814 F.2d 205 (5th Cir.) *cert. denied*, ___ U.S. ___, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987); *Milton v. Procunier*, 744 F.2d at 1097.

V

[7,8] Selvage next argues that the Texas capital sentencing procedure prevents the jury's consideration of mitigating evidence. We are not persuaded that Selvage has a likelihood of succeeding on this claim. Selvage's first difficulty is that he did not object to the court's charge at the punishment phase of the trial; he requested no instruction on mitigating evidence, and did not otherwise question the capital sentencing structure on the grounds he now urges. *Ex Parte Selvage*, No. 16, 884-02 (March 21, 1988). Of course, a federal habeas court cannot review a claimed error in the conduct of a state criminal

trial when the state has refused review in reliance on its contemporaneous objection rule, absent cause and prejudice for failure to object. We find no legal cause for the absence of objection.

Approximately a month before Selvage's trial, the Texas Court of Criminal Appeals rejected a similar if not identical argument and the Supreme Court had not acted on the petition for certiorari in that case. *Quinones v. State*, 592 S.W.2d 933 (Tex.Crim.App.), *Cert. denied*, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980). It follows that the issue is not a recently found legal theory not knowable by competent trial counsel. *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984) (so novel that its legal basis is not reasonably available). Nor is its rejection by the Texas Court of Criminal Appeals a legal excuse for not objecting. "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." *Engle v. Isaac*, 456 U.S. 107, 131, 102 S.Ct.1558, 1573, 71 L.Ed.2d 783 (1982). It is true that the Texas statute had been upheld in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Jurek*, five years before Selvage's trial, the Court observed that "[i]t is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. . . . We cannot . . . construe the statute; that power is reserved to the Texas courts." *Jurek*, 428 U.S. at 272 n. 7, 96 S.Ct. at 2956 n. 7. We cannot read these cases to so foreclose Selvage's argument that his counsel should not have preserved the point. Finally, it is no

answer that "counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it. . . ." *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986).

Second, even if Selvage could elude the procedural hurdle, we must ask whether he has presented a serious legal question. Selvage relies upon the granting of certiorari in *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 221, 98 L.Ed.2d 180 (1987), as well as our recent discussion of the issue in *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir.1987). The Supreme Court granted certiorari in *Franklin* to consider "[w]hether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme." In *Williams v. Lynaugh*, 837 F.2d 1294, 1295-96 (5th Cir. 1988), we refused to stay an execution pending decision by the Supreme Court in *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir.), *cert. granted*, ___ U.S. ___, 108 S.Ct. 221, 98 L.Ed.2d 180 (1987), and the Supreme Court in turn granted the requested stay on February 10, 1988. *See Williams v. Lynaugh*, ___ U.S. ___ , 108 S.Ct. 1000, 98 L.Ed.2d 967 (1988).

It is argued that the stay by the Supreme Court in *Williams* explicitly rejected our conclusion in *Williams* that the *Franklin* issue did not present a "substantial case on the merits involving a serious legal question." *Williams v. Lynaugh*, 837 F.2d 1294, 1298 (5th Cir.1988). Pointing to *Barefoot v. Estelle*, 463 U.S. 880, 895, 103 S.Ct. 3383, 3395, 77 L.Ed.2d 1090 (1983), the argument continues that this follows because the Supreme Court will not grant a stay of execution unless there is, inter alia, "a significant possibility of reversal of the lower court's decision. . . ."

[9] The argument has considerable force, but we have not concluded that a grant of certiorari necessarily warrants a stay. We have adhered to the rule that panels will decide death penalty cases by application of controlling circuit precedent;[2] that precedent is that the Texas statute is constitutional. *Penry v. Lynaugh*, 832 F.2d at 926; *see also Streetman v. Lynaugh*, 835 F.2d 1519 (5th Cir.) *stay denied*, ___ U.S. ___ , 108 S.Ct. 588, 98 L.Ed.2d 634 (1988); *cf. Johnson v. McCotter*, 804 F.2d 300 (5th Cir.1986).

We would find it even more difficult rationally to order outcomes if we were required to guess the meaning of unexplained grants of a stay or writs of certiorari. Rather, we apply the settled law of our circuit until it is changed by our court or the Supreme Court has plainly signaled a change. A brief review of the cases in which the Supreme Court has granted requests for stays and petitions for writs of certiorari explain our sense that abiding out settled view of the law until told to do otherwise best strikes for rational and evenhanded justice. We agree that the grant of stay in *Williams* suggests that the Supreme Court may disagree with this court's assessment of the *Franklin* issue. But this is not the kind of plain disagreement with our law that ought to gird our grant of a stay in the teeth of our own decisions.

---

[2] "In the absence of declaration by the Supreme Court that executions should be stayed in cases presenting the issue raised by Wicker, we must follow our circuit's precedents and deny both a certificate of probable cause and a stay of execution on this issue." *Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir.1986).

Yet, there is an additional circumstance that weighs in favor of Selvage. We ourselves have questioned our treatment of the *Franklin* issue. *Penry v. Lynaugh*, 832 F.2d 915 (1987). The grant of certiorari in *Franklin* effectively halted any reconsideration of the issue by our en banc court. In these circumstances the execution of a death sentenced prisoner with a properly preserved and potentially valid *Franklin* claim should be stayed. Our rejection of a stay on this claim then rests only upon Selvage's failure to object to the instruction at the punishment phase or to request additional instruction.

VI

Finally, Selvage contends that he suffered from ineffective assistance of counsel. As we understand Selvage's argument, it is that the state's process at the penalty phase denies his counsel the opportunity to provide effective counsel. This claim must fail for the reasons that the premise upon which it rests has been rejected.

Insofar as Selvage attempts to rely upon ineffective assistance of counsel as measured by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), he must affirmatively demonstrate prejudice. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Selvage's counsel, John Crow, filed an affidavit. Crow asserts that he decided not to investigate Selvage's mental background, the asserted failure, because as he saw it, the state's rebuttal evidence would turn Selvage's mitigating evidence against him on the question of future dangerousness. We are left with a claim of ineffectiveness that is no more than a variation of the *Franklin* claim.

VII

Our decision to vacate this stay then rests only upon Selvage's failure to object and the state court's reliance upon Texas' contemporaneous objection rule. We are presented with no claim of factual innocence and under *Engle v. Isaac*, we find no legal excuse. We therefore vacate the stay of execution granted by the district court and deny Selvage's request for stay pending his appeal of the claims dismissed by the district court and for a certificate of probable cause pending appeal.

SUPREME COURT OF THE UNITED STATES

No. 87-6700

John Henry Selvage,
Petitioner

v.

James A. Lynaugh, Director, Texas Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition, but rephrased as follows: "At the time petitioner was tried, was there 'cause' for not raising a claim based upon arguments later accepted in *Penry v. Lynaugh*, No. 87-1677 (June 26, 1989); and if not, would the application of a procedural bar to the claim result in a 'fundamental miscarriage of justice,' *Smith v. Murray*, 477 U.S. 478 (1986)?"

October 10, 1989

Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-6700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN HENRY SELVAGE,

Petitioner,

v.

JAMES A. LYNAUGH,
Director, Texas Department of Corrections

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

DAVID CUNNINGHAM
1927 Norfolk
Houston, TX 77098
(713) 520-7701

JULIUS L. CHAMBERS
*RICHARD H. BURR, III
GEORGE H. KENDALL
STEVEN W. HAWKINS
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 219-1900

Counsel for Petitioner

**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

At the time petitioner was tried, was there "cause" for not raising a claim based upon arguments later accepted in Penry v. Lynaugh, 106 L.Ed.2d 256 (1989); and if not, would the application of a procedural bar to this claim result in a "'fundamental miscarriage of justice,'" Smith v. Murray, 477 U.S. 527 (1986)?

TABLE OF CONTENTS

PAGES

STATEMENT OF THE CASE.....2

A. Course of Prior Proceedings....2

B. Material Facts.....5

i. Facts Which Were Presented at Trial.....5

ii. Penalty Phase Argument and Instruction.....12

iii. Facts Revealed in the Habeas Corpus Proceedings Which Were Not Presented To The Jury

SUMMARY OF ARGUMENT.....31

ARGUMENT.....33

I. NO ADEQUATE AND INDEPENDENT STATE GROUND BARS MR. SELVAGE'S PENRY CLAIM.....33

A. Texas Law Excuses the Failure of a Criminal Defendant to Raise at Trial a Constitutional Claim Which Had Not Been Recognized at the Time of Trial But Is Subsequently Vindicated by This Court.....37

B. Any State-Law Bar Would Not Be "Adequate," as It Is Enforced Neither Consistently nor Strictly; Nor Would It Be "Independent," as It Depends upon a Federal Constitutional Ruling.....46

II. MR. SELVAGE'S FAILURE TO RAISE A PENRY CLAIM AT TRIAL SHOULD BE EXCUSED FOR "CAUSE" SINCE THAT CLAIM WAS NOT REASONABLY AVAILABLE TO COUNSEL.....54

III. THE APPLICATION OF A PROCEDURAL BAR TO MR. SELVAGE'S PENRY CLAIM WOULD RESULT IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE.....80

A. The Concept Of "Fundamental Miscarriage Of Justice" Cannot Be Limited To Constitutional Violations Which Have "Probably Resulted In The Conviction Of One Who Is Actually Innocent".....80

B. The Penry Error In Mr. Selvage's Trial Involves A Fundamental Miscarriage Of Justice.....90

i. The Penry Violation in Mr. Selvage's Trial.....91

ii. The Penry Error Deprived Mr. Selvage of the "Basic Trial Process" Guaranteed to A Capital Defendant.....101

iii. The Penry Error in Mr. Selvage Case Precluded the Jury's Consideration of the Most Compelling Mitigating Circumstances That Can Be Proffered.....106

iv. The Penry Violation in Mr. Selvage's Case Probably Resulted in the Imposition of the Death Sentence on One Who Is Actually Undeserving of It.....110

CONCLUSION.....116

TABLE OF AUTHORITIES

Cases: **Page**

Adams v. State,
577 S.W.2d 717
(Tex. Cr. App. 1979) 50, 62, 74

Adams v. Texas,
448 U.S. 38 (1988) 43, 63

Ake v. Oklahoma,
470 U.S. 68 (1985) 52, 53

Barr v. City of Columbia,
378 U.S. 146 (1964) 47, 52

Batson v. Kentucky,
476 U.S. 179 (1986) 46

Blackledge v. Perry,
417 U.S. 21 (1974) 74

Blansett v. State,
556 S.W.2d 322
(Tex. Cr. App. 1977).....61

Boddie v. Connecticut,
401 U.S. 371 (1971) 101

Boulware v. State,
542 S.W.2d 677
(Tex. Cr. App. 1976).....37, 43

Brown v. Allen,
344 U.S. 443 (1952).....74

Burgett v. Texas,
389 U.S. 105 (1967).....43

Caldwell v. Mississippi,
472 S.W.2d 320 (1985).....106

California v. Brown,
479 U.S. 538 (1987).....109, 115

Callins v. State,
No. 69,023, (Tex. Cr.
App. Sept. 27, 1989).....44

Chambers v. State,
568 S.W.2d 313
(Tex. Cr. App. 1978).....40

Chitwood v. State,
703 S.W.2d 360
(Tex. Ct. App. 5th
Dist. 1986).....38

Clark v. State,
717 S.W.2d 910
(Tex. Cr. App. 1986).....50

Collins v. State,
548 S.W.2d 368
(Tex. Cr. App. 1976).....61

Collins v. Texas,
430 U.S. 959 (1977)
(table).....71

Connecticut v. Johnson,
460 U.S. 73 (1983).....105

Cuevas v. State,
641 S.W.2d 558
(Tex. Cr. App. 1982).....37, 43

Desist v. United States,
394 U.S. 244 (1969).....76, 79

Downs v. Dugger,

514 So.2d 1069
(Fla. 1987).....100

Duckworth v. Serrano,
454 U.S. 1 (1981).....74

Dugger v. Adams,
103 L.Ed.2d 435
(1989).....51, 106

Eddings v. Oklahoma,
455 U.S. 104 (1982).....103, 105
107

Emmund v. Florida,
458 U.S. 782 (1982).....97

Engle v. Isaac,
456 U.S. 107 (1982).....passim

Estelle v. Smith,
451 U.S. 454 (1981).....38, 87

Ex parte Casarez,
508 S.W.2d 620
(Tex. Cr. App. 1974).....37, 43

Ex parte Chambers,
688 S.W.2d 483
(Tex. Cr. App. 1984).....passim

Ex parte Demochette,
633 S.W.2d 879
(Tex. Cr. App. 1982).....40

Ex parte Flores,
537 S.W.2d 458
(Tex. Cr. App. 1976) 43

Ex parte Granviel,
561 S.W.2d 503
(Tex. Cr. App. 1978).....61

Ex parte Hall,
546 S.W.2d 303
(Tex. Cr. App. 1977).....43

Ex parte Martin,
479 S.W.2d 280
(Tex. Cr. App. 1972).....43

Ex parte Ropollo,
550 S.W.2d 869
(Tex. Cr. App. 1977).....43

Ex parte Sanders,
580 S.W.2d 383
(Tex. Cr. App. 1979).....37

Ex parte Taylor,
484 S.W.2d 748
(Tex. Cr. App. 1972).....37

Ex parte Turner,
542 S.W.2d 187
(Tex. Cr. App. 1976).....44

Ex parte Woods,
745 S.W.2d 21
(Tex. Cr. App. 1988).....40

Field v. State,
627 S.W.2d 714
(Tex. Cr. App. 1982).....39

Fierro v. State,
706 S.W.2d 310
(Tex. Cr. App. 1986).....51

Ford v. Wainwright,
477 U.S. 399 (1986).....108

Francis v. Henderson,
425 U.S. 536 (1976).....54

Frank v. Mangum,
237 U.S. 309 (1915).....112

Franklin v. Lynaugh,
101 L.Ed.2d 155
(1988).....94, 99

Gholson v. State,
542 S.W.2d 395
(Tex. Cr. App. 1976).....61

Gholson v. Texas,
432 U.S. 911 (1977)
(table).....71

Granviel v. Estelle,
No. CA-4-78-115
(N.D. Tex. Jan. 26,
1979).....66, 71

Granviel v. State,
552 S.W.2d 107
(Tex. Cr. App. 1976).....61

Granviel v. Texas,
431 U.S. 933 (1977)
(table).....71

Hargrave v. Dugger,
832 F.2d 1528
(11th Cir. 1987).....78

Harmon v. State,
527 So.2d 182
(Fla. 1989).....100

Harris v. Reed,
103 L.Ed.2d 308
(1989).....35

Hartfield v. State,

645 S.W.2d 463
(Tex. Cr. App. 1980).....43

Hathorn v. Lovorn,
457 U.S. 255 (1982).....36

Henry v. Mississippi,
379 U.S. 443 (1965).....35

Herb v. Pitcairn,
324 U.S. 117 (1945).....52

Hitchcock v. Dugger,
481 U.S. 393 (1987).....77, 107

Hovey v. Elliot,
167 U.S. 409 (1897).....101-02

In Re Winship,
397 U.S. 358 (1970).....67

James v. Kentucky,
466 U.S. 341 (1984).....47

James v. State,
772 S.W.2d 84
(Tex. Cr. App. 1989).....46

Johnson v. Mississippi,
100 L.Ed.2d 575
(1988).....35

Johnson v. State,
691 S.W.2d 619
(Tex. Cr. App. 1984).....50

Jones v. Barnes,
463 U.S. 745 (1983).....72-73

Jurek v. Texas,
428 U.S. 262 (1976).....passim

King v. State,
552 S.W.2d 105
(Tex. Cr. App. 1977).....60, 61, 74

King v. Texas,
434 U.S. 1088 (1978)
(table).....71

Kuhlmann v. Wilson,
477 U.S. 436 (1986).....111, 112

Livingston v. State,
542 S.W.2d 655
(Tex. Cr. App. 1976).....39

Lockett v. Ohio,
438 U.S. 586 (1978).....passim

Mathews v. State,
768 S.W.2d 731
(Tex. Cr. App. 1989).....46

Moore v. State,
542 S.W.2d 664
(Tex. Cr. App. 1976).....39

Motley v. State,
773 S.W.2d 283
(Tex. Cr. App. 1989).....50

Muniz v. Procunier,
760 F.2d 588
(5th Cir. 1985).....41, 42, 46

Murray v. Carrier,
477 U.S. 478 (1986).....passim

NAACP v. Alabama ex
rel. Patterson,
357 U.S. 449 (1958).....78

Nix v. Whiteside,
475 U.S. 157 (1986).....74

Obryan v. State,
591 S.W.2d 464
(Tex. Cr. App. 1979).....61

Ocker v. State,
477 S.W.2d 288
(Tex. Cr. App. 1972).....43

Penry v. Lynaugh,
106 L.Ed.2d 256
(1989).....passim

Powell v. State,
742 S.W.2d 353
(Tex. Cr. App. 1987).....41

Quinones v. State,
592 S.W.2d 933
(Tex. Cr. App. 1980).....63, 64, 74

Reed v. Ross,
468 U.S. 1 (1984).....passim

Roberts v. LaVallee,
389 U.S. 40 (1967).....74

Rose v. Clark,
478 U.S. 570 (1986).....passim

Selvage v. State,
680 S.W.2d 17
Tex. Cr. App. 1984).....97

Skipper v. South Carolina,
476 U.S. 1 (1986).....93, 107, 108, 109

Smith v. Murray,
477 U.S. 527 (1986).....passim

Smith v. State,
540 S.W.2d 693
(Tex. Cr. App. 1976).....39

Sosa v. State,
769 S.W.2d 909
(Tex. Cr. App. 1989).....50

South Carolina v. Gathers,
104 L.Ed.2d 876
(1989).....107

State v. Sonnier,
402 So.2d 650
(La. 1981).....100

Stewart v. State,
686 S.W.2d 118
(Tex. Cr. App. 1984).....49

Teague v. Lane,
103 L.Ed.2d 334
(1989).....75, 88 104

Thompson v. Dugger,
515 So.2d 173
(Fla. 1987).....77

Tison v. Arizona,
481 U.S. 137 (1987).....109

United States v. Johnson,
457 U.S. 537 (1982).....56

Wade v. Mayo,
334 U.S. 672 (1948).....74

Wainwright v. Sykes,

433 U.S. 72 (1977).....34, 54

Washington v. Texas,
388 U.S. 143 (1967).....44

Williams v. State,
622 S.W.2d 116
(Tex. Cr. App. 1981).....51

Williams v. State,
674 S.W.2d 315
(Tex. Cr. App. 1984).....48

Williams v. State,
773 S.W.2d 525
(Tex. Cr. App. 1988).....46

Witherspoon v. Illinois,
391 U.S. 510 (1968).....43

Woodson v. North Carolina,
428 U.S. 280 (1976).....103

Zant v. Stephens,
462 U.S. 862 (1983).....116

Other Authorities:

Friendly, Is Innocence
Irrelevant? Collateral
Attack on Criminal
Judgments, 38 U. Chi. L.
Rev. 142 (1970).....88

Ledewitz, Procedural
Default in Death
Penalty Cases: Fundamental
Miscarriage of Justice
and Actual Innocence,
24 Crim. L. Bull. 379
(1989).....82

CITATION TO OPINION BELOW

The order of the District Court denying habeas corpus relief is unreported. JA 63-67. The opinion of the Court of Appeals is reported as Selvage v. Lynaugh, 842 F.2d 89 (5th Cir. 1988). JA 68-82.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered March 28, 1988. The petition for writ of certiorari was filed on March 29, 1988, and certiorari was granted on October 10, 1989. Jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, which are set out in the Appendix hereto. It also involves Tex. Code. Crim. Proc. Ann. art. 37.01 (Vernon 1981), which is also set out in

the Appendix.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Mr. Selvage was convicted of capital murder on February 8, 1980, and was sentenced to death on February 11, 1980, in the District Court for the 230th Judicial District, Harris County, Texas. His conviction and sentence were affirmed by the Texas Court of Criminal Appeals on July 11, 1984. Selvage v. State, 680 S.W.2d 17 (Tex. Crim. App. 1984). No petition for certiorari was filed.

Mr. Selvage thereafter filed a petition for habeas corpus in the United States District Court for the Southern District of Texas. Relief was denied October 6, 1986, and the Fifth Circuit affirmed July 23, 1987. Selvage v. Lynaugh, 823 F.2d 845 (5th Cir. 1987). Certiorari was denied October 2, 1987.

Selvage v. Lynaugh, 98 L.Ed.2d 268 (1987).

On January 21, 1988, Mr. Selvage filed a state habeas corpus petition. On March 14, 1988, the District Court for the 230th Judicial District recommended denial of the petition. JA 29-37. On March 21, 1988, the Texas Court of Criminal Appeals adopted the recommendation. Ex parte Selvage, No. 16, 884-02; JA 38-39.

On March 22, 1988, Mr. Selvage activated a petition for habeas corpus which had previously been lodged in the United States District Court for the Southern District of Texas. JA 7-28. On March 25, 1988, the District Court entered orders dismissing three of Mr. Selvage's four claims, withholding adjudication of the fourth claim because it presented an issue then pending before the en banc Fifth Circuit in King v. Lynaugh, 828 F.2d 257 (5th Cir.), reh. en banc granted, 828

F.2d 269 (5th Cir. 1987), and granting a stay of Mr. Selvage's execution scheduled for March 30, 1988. JA 63-67. The state moved the Fifth Circuit to dissolve the stay of execution, and Mr. Selvage appealed from the dismissal of the three claims and sought a stay of execution on appeal if the District Court's stay was dissolved. On March 28, 1988, the Fifth Circuit granted the state's motion, denied Mr. Selvage's request for a stay, and denied a certificate of probable cause. Selvage v. Lynaugh, 842 F.2d 89 (5th Cir. 1988); JA 68-82.

On March 29, 1988, this Court granted a stay of execution, Selvage v. Lynaugh, No. A-741, and on October 10, 1989, it granted certiorari, limited to the question which -- as rephrased by the Court -- is set out at page i supra. JA 83.

B. Material Facts

i. Facts Which Were Presented at Trial

Sometime before the end of July, 1979, Wilbur Kelly told Carl Marlborough, that Kelly and John Selvage planned to commit several robberies. R. 2688, 2715-16.[1] On July 30, 1979, Kelly and Selvage, along with Brenda Joseph, entered Ventura's Jewelry in Houston to commit one of the robberies Kelly had mentioned.

Stephen Ventura, the owner of the store, felt uncomfortable when these three people entered because they had been in the store earlier and were not regular customers. R. 2296. Deputy Sheriff Al Garza of the Harris County Sheriff's Department was in the store that

---

1 References to the record on appeal filed in the Texas Court of Criminal Appeals in connection with the direct appeal are to "R," followed by the page number of the sequentially paginated record as a whole.

afternoon. He was a friend of Ventura and had stopped to use the phone. R. 2294. Deputy Garza was in plain clothes but was wearing his badge on his belt and his service revolver. Id. Ventura told Garza about his discomfort. R. 2296. Garza came to one of the store's counters, removed his coat, "obviously" displayed his badge and gun, and began waiting on one of the three people. R. 2298, 2302. A few moments later, Ventura heard a gunshot, felt Garza slump against him, and immediately ran to a rear office to retrieve a gun. R. 2305-2306. He heard more gunshots and glass breaking; then he began shooting at the men in the store. R. 2306-2307. Ventura chased the men as they fled from the store; he shot at them; they both shot at him. R. 2308-2312. The men got to a car and drove off. Id. Deputy Garza had been killed in this

incident; no one else was injured.[2]

Neither Mr. Ventura nor anyone else in the store saw which person fired the shot that killed Deputy Garza.[3] R. 2363, 2395, 2445. However, Ken Roberts, an employee who was present, and Mr. Ventura both made significant observations about the demeanor of Wilbur Kelly and John Selvage during the course of the incident. Roberts testified that he knew that one of the men involved in the Ventura's robbery had been killed a few days after the robbery. R. 2433. He was not surprised to learn that the man killed was Wilbur Kelly, because Kelly "seemed

---

2 Deputy Garza died from a single gunshot wound, which entered the right side of his neck and exited the left side, severing his subclavian artery. R. 2727-2728.

3 As revealed by an examination of the bullets recovered from the store, shots were fired by two guns other than Ventura's. R. 2758-2760. None of the bullets could be identified as the one that killed Deputy Garza. R. 2567-2568.

like the wilder of the two when they were in the store." Id. Ventura remembered that Kelly seemed to be the leader because he was calmer and talked more than Selvage, who was nervous. R. 2352-53. But Roberts was particularly troubled by Kelly's reckless demeanor: "[H]e acted stranger than the other man [Selvage]." Id.

During the penalty phase, the state offered additional evidence. Two prior federal convictions of Mr. Selvage were introduced, one for possession of controlled substances, the other for conspiracy to commit bank robbery. R. 2894. In neither case was there any indication that any person was harmed. The state also called a witness from the New Orleans Sheriff's Department, Captain Ronald Cherry. He told the jury that on July 22, 1975, while incarcerated in a

Louisiana state facility, Selvage escaped. R. 2897. On cross-examination, he revealed that, in attempting to escape, Selvage fell several floors and sustained significant injuries requiring hospitalization. No escape from the institution was effectuated. R. 2902.

Finally, the jury heard two witnesses implicate Mr. Selvage in a July 26, 1979 robbery/murder at a "Stop-and-Go" store in Houston.[4] Michael McWilliams told the jury that he was working at the Stop-and-Go convenience store when a person he identified as Selvage entered with another black male and demanded money from the register. R. 2834-45.[5] McWilliams was

---

[4] Mr. Selvage was never formally charged with or tried for this crime.

[5] There was no dispute that the other person involved in this incident was Wilbur Kelly. See R. 2973 (prosecutor arguing that Selvage and Kelly had committed the Stop-and-Go robbery four days before the Ventura's robbery). Consistent with the observations of the respective roles and demeanors

ordered to the back room and later placed in a small bathroom. Id. After hearing the assailants searching for money, McWilliams heard gunshots. He waited a while in the bathroom and then went to the front of the store, where he saw a customer who had been shot. Id. Neither McWilliams nor Al Bell, another customer in the store at this time, saw which of the robbers shot the customer (who later died). R. 2881.

The defense offered Mr. Selvage's sister, Audrey Picou, as its primary witness in mitigation. Picou initially described her brother's upbringing. She told the jury that Selvage had been raised in a very close, religious family

---

of Kelly and Selvage in the Ventura's robbery, McWilliams testified that Kelly was the first person to pull out a gun and to order him around. R. 2838. While Kelly was emptying the cash register Selvage was just watching; he did not have a gun out at that time. Id.

and, unlike other children they knew, had been exposed to the arts and music. R. 2895-2912. In school he was an "A" and "B" student. Id. Throughout his early and school years, he was a happy, normal child.

In 1968, Ms. Picou recalled, Mr. Selvage was drafted into the military. When he was discharged not quite two years later, he came back a very different person. R. 2911. In her terms "he came back in a straight jacket." R. 2910. He had become addicted to heroin and spent several months in military hospital treatment centers. Id. When he finally returned to New Orleans, he was not able to work for a period of time, but later found work at a gas station. R. 2910-11.

She testified further that she had never seen Mr. Selvage exhibit violent behavior and she opined that he was a

peaceful person. R. 2912, 2921. This was consistent with their family, she said: no other family member had ever been arrested. R. 2912-13. She also opined that Mr. Selvage had the strength of character to be rehabilitated. R. 2914.[6]

ii. Penalty Phase Argument and Instruction

The defense case in relation to special issue one[7] rested on the absence of evidence that Mr. Selvage shot Deputy Garza or anyone else. R. 2947-48, 2951-52. Defense counsel relied upon the absence of evidence to argue that Selvage did not shoot anyone and thus did not

[6] The only other defense witness was Dr. Jose Garcia, director of mental health services for the Texas Department of Corrections, R. 2924, who described the rehabilitative programs offered by the Department of Corrections to inmates.

[7] "Do you find from the evidence beyond a reasonable doubt whether the conduct of the defendant, John Henry Selvage, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" JA 4.

deserve to die. R. 2952. Counsel conceded that even though Selvage did not shoot anyone, the jury could answer special issue one "yes." R. 2951 ("there is no question that under the law you have got the option to execute John Selvage"). However, he urged the jury not to do so as a matter of "conscience." Id.

In response, the prosecution argued that it did not matter whether Selvage actually shot Al Garza. The requirement of special issue one that "the conduct of the defendant ... that caused the death of the deceased [be] ... committed deliberately," JA 4, was satisfied because there was evidence that Mr. Garza was killed deliberately -- even though one could not say whether the killer was Wilbur Kelly or John Selvage -- and because Selvage had engaged in other deliberate criminal acts during the course

of the crime: planning the robbery, arming himself, and shooting at people other than Garza. R. 2968-71. The prosecutor conceded, "[w]e can't say the bullet came out of ... the defendant's gun...." R. 2970. However, he twice reiterated that the "deliberately committed conduct" aspect of special issue one did not require that Selvage be the one who fired the fatal shot so long as Selvage engaged in other deliberate acts in furtherance of the crime. R. 2972, 2973.

The prosecutor then argued that the second aspect of issue one, which focused on the defendant's "reasonable expectation that the death of the deceased or another would result," JA 4, was readily established by two facts: the act of taking a loaded gun into a store to commit a robbery, and Mr. Selvage's experience four days before the Ventura's robbery

when, during the armed robbery of the Stop-and-Go market, someone was killed. R. 2973.

On the basis of this analysis, the prosecution argued that the jury had no choice but to answer special issue one "yes." "The only proper answer to the first question is yes. That is the only proper answer based on the evidence." Id.

The prosecution's case in relation to special issue two[8] rested on Mr. Selvage's convictions of federal crimes, his attempted escape in New Orleans, and his participation in the Ventura's and Stop-and-Go robbery-murders. R. 2974-75.

The defense sought to put Mr. Selvage's criminal acts in perspective by emphasizing that they did not begin until

---

8 "Do you find from the evidence beyond a reasonable doubt whether there is a probability that the defendant, John Henry Selvage, would commit criminal acts of violence that would constitute a continuing threat to society?" JA 4.

he returned from the military "in a strait jacket" due to drug addiction, after which he "started engaging in a life of crime." R. 2945. His addiction was portrayed as the primary factor underlying his criminal activity:

> This drug situation, I am not going to come into you and say it wasn't John Selvage that was convicted before -- it was the drugs -- that's what did it. He had no free will of his own.

R. 2957.

iii. Facts Revealed in the Habeas Corpus Proceedings Which Were Not Presented To The Jury

In the subsequent state and federal habeas corpus proceedings, facts were discovered which were highly material to the appropriateness of a death sentence for Mr. Selvage. These facts demonstrated that Mr. Selvage was far more disabled--mentally, emotionally, and physically--than the trial evidence revealed, and that

it was more likely that Wilbur Kelly, not Selvage, fired the shot that killed Deputy Garza. Most of these facts were developed through new investigation, but some had emerged at a pretrial hearing on Mr. Selvage's motion to suppress his confessions. They are presented here because they bear upon the Court's "fundamental miscarriage of justice" inquiry.

There was substantial evidence to support Audrey Picou's penalty trial testimony that her brother came back from the military addicted to drugs. On the day before he was arrested,[9] Mr. Selvage injected both an amphetamine (Preludin) and heroin. R. 683, 686-87, 776-77. The New Orleans police officers who arrested

---

[9] Mr. Selvage was arrested on August 10, 1979 in New Orleans, ten days after the Ventura's Jewelry store robbery. He was from New Orleans and returned there after the robbery.

him suspected that he was under the influence of drugs, because he was "a little incoherent on occasion[,] ... nodding in and out", R. 532 (Det. Albright), "lackadaisical[,] ... kind of slowed down [,] ... [and] [d]rifting in and out of reality," R. 571 (Det. Miller). Further, there was substantial evidence of chronic drug use and addiction. In the suppression hearing, Mr. Selvage testified that he was using $200 to $300 worth of drugs every day. R. 780. Objective evidence of his addiction was apparent to the police. He displayed some of the symptoms associated with heroin withdrawal -- stomach cramps, extreme thirst, and a craving for something sweet, R. 532, 539, 633, 652-53 -- and he had needle marks on his arms. R. 652.

However, an addiction to mind-and-mood-altering drugs was not the only

disability suffered by Mr. Selvage. He also suffered from severe mental illness and from the effects of brain damage. Together with his drug addiction, these disabilities led him to become associated with a highly aggressive, reckless, violent man like Wilbur Kelly, and made him vulnerable to participating with Kelly in the crimes for which he was sentenced to death.

By the time of the robberies in Houston, Mr. Selvage had suffered the symptoms of psychosis for nearly a decade. These symptoms were first documented in April, 1970, when Mr. Selvage was only nineteen years old. He was medically discharged from the Air Force at that time because he was becoming psychotic. The examination which precipitated his discharge revealed that Mr. Selvage was seen on an emergency basis because "[he]

rammed his fist through a window in an attempt to catch the people that he thought were 'spying' on him." Appendix A to the federal habeas petition.[10] The examination further revealed that Mr. Selvage "felt people were watching him everywhere on base," "admitted hearing whispering voices at night over the past few weeks and ... that these voices were talking about him," experienced "frequent ideas of reference,"[11] had a "blunted affect," and as a result of these things, "had difficulty sleeping at night and

---

10 The petition, without the appendices, is at JA 7-28.

11 An "idea of reference" is "[a]n idea, less firmly held than a delusion, that events, objects, or other people in the person's immediate environment have a particular and unusual meaning specifically for him or her." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 399 (3d Ed. Revised 1987) [hereafter, "DSM-III-R"].

performing his duties at work." Id. [12]

Thereafter, when Mr. Selvage was incarcerated for a federal conviction in the latter half of the 1970's, Bureau of Prisons mental health personnel diagnosed him as suffering from "paranoid schizophrenia." Appendix B to the habeas petition.[13]

In December, 1987 and again in January, 1988, Mr. Selvage was examined by a psychiatrist, Dr. James R. Merikangas. On the basis of Selvage's "well-documented history of psychosis from at least 1969 or 1970", a history of "severe head

---

12 Mr. Selvage's symptoms are characteristic of the delusions, hallucinations, peculiar ideas, affect, and impairment in every day functioning associated with paranoid schizophrenia. See DSM-III-R, at 194-95, 197.

13 From the date of this diagnosis in January, 1977, until his release from federal custody in late 1978, Mr. Selvage was given daily therapeutic doses of Thorazine, a drug often used in the treatment of schizophrenia.

injury,"[14] the continuing treatment of Selvage with anti-psychotic medications and anti-seizure medication on death row, and his own examination of Selvage, Dr. Merikangas concluded that Selvage still suffered from a psychotic illness, and, in addition, from brain dysfunction. Appendix D to the habeas petition, at 3.

Dr. Merikangas' diagnosis was confirmed in evaluations of Mr. Selvage that were conducted at the request of the state during the pendency of Selvage's state habeas petition in February, 1988. Dr. John Nottingham, the state's psychiatrist, noted that on February 9, 1988, Selvage "does still appear to have evidence of delusional thinking in regards to his concept of various personalities

---

[14] Mr. Selvage's severe head injury was documented "in the [medical] records as a skull fracture, as the result of a fall from a multiple story building." Appendix D to the habeas petition, at 2.

taking over his mind and body and he indicates that at times he has auditory hallucinations." Appendix C, attached to Petitioner's Supplemental Memorandum in Support of Motion to Stay Execution, March 23, 1988, filed in the United States District Court for the Southern District of Texas (No. H-86-0166), at page 4. Upon reviewing Selvage's history, Dr. Nottingham concluded, "It would appear that the subject does have a long standing history of mental illness which has reflected itself in overt psychosis at various times." Id. Similarly, the state's psychologist, Dr. Jerome Brown noted the following:

> Mental status examination reveals the defendant to still exhibit a number of symptoms of severe mental illness including the delusional belief that his body is inhabited by several personalities, the continuing experience of auditory hallucinations, and his tendency to answer questions in

> a very talkative, somewhat rambling fashion. In addition, the defendant does have a significant past psychiatric history and describes his current difficulties in a manner that makes them credible.

Appendix D, op. cit., supra, at page 3.[15]

In light of Mr. Selvage's history and the unavailability of treatment at the time of the Ventura's Jewelry robbery, Dr. Merikangas concluded that Selvage was suffering "from a psychosis as well as other disorders at the time of the crime." Appendix D to the habeas petition, at 3-4. Further, he concluded that the psychosis, together with the impairments of drug intoxication and brain damage, would have substantially impaired Selvage's capacity to appreciate the wrongfulness of his

---

15 Mr. Selvage's medical records since his incarceration on death row are consistent with the views of the forensic experts. Prison personnel have frequently recorded his experiencing "bizarre and apparently psychotic delusions," JA 21, "somatic delusions," id., and paranoid delusions accompanied by hallucinations, JA 21-22.

criminal conduct and to refrain from engaging in such conduct at that time. Id., at 4. As he explained,

> According to John, he was high on heroin and amphetamines at the time of the crime. Amphetamines alone can induce a paranoid state and generate increased motor activity, resulting in paranoid ideation and violent acts which may be completely spontaneous or in response to command hallucinations. The kind of brain injury that John has probably suffered would have compounded both the drug-induced paranoia and his pre-existing psychosis, for such an injury lowers one's ability to modulate and resist strong impulses. The severity of John's psychosis would likely have caused him to misperceive simple gestures as threats and to act on them without any basis in reality.

Appendix D to the habeas petition, at 4.

This analysis was relevant on the assumption that Mr. Selvage was the person who fired the fatal shot at Deputy Garza: if Selvage did fire that shot, he likely did so because he misperceived Deputy

Garza as threatening him. But Dr. Merikangas also determined that Selvage's disabilities could have played a very different role during the Ventura's robbery. They could, if various conditions were present, have caused him to go along passively with a scenario in which Wilbur Kelly, rather than Selvage, was the primary aggressor. As Dr. Merikangas explained:

> While these combined factors could have produced a violent, uncontrolled outpouring of aggressive behavior, John's use of heroin could have mollified his aggression -- if the dosage were high enough -- and taken away his will to act. In this state, without the ability to perceive the external world accurately and make appropriate judgments in response to it because of his psychosis, John could have been peculiarly susceptible to the coercion, influence, and designs of others.

Appendix D to the habeas petition, at 4.

Dr. Merikangas' alternative

formulation of the potential effects of Mr. Selvage's disabilities at the time of the crime takes on added significance in light of other evidence not considered by Selvage's trial jury: evidence that Wilbur Kelly, rather than Selvage, actually killed Deputy Garza. Dr. Merikangas' observation that Mr. Selvage's disabilities could have made him a passive follower at the time of the Ventura's robbery -- relatively unaggressive and vulnerable to Kelly's domination or influence -- is quite consistent with witnesses' observations of Kelly and Selvage during both the Ventura's and the Stop-and-Go robberies. So is evidence relating to the arrest of Selvage and attempted arrest of Kelly in New Orleans ten days after the robbery of Ventura's Jewelry.

On August 10, 1979, police offers

tried to arrest Wilbur Kelly in New Orleans, where he was wanted for the commission of two other murders. John Selvage, who had returned to New Orleans shortly after the Ventura's robbery, was arrested first, at 4:30 a.m. that day, for his participation in the Ventura's and Stop-and-Go robberies in Houston. R. 500, 503, 536. The New Orleans officers who arrested Selvage were primarily interested in apprehending Kelly, due to the Louisiana murders, R. 536, and their strong belief that Kelly was "a killer." R. 547. Thus, their questioning of Selvage was directed to learning where Kelly might be found. R. 547. Selvage gave the officers this information. R. 523. Thereafter, at approximately 7:30 a.m., New Orleans officers located Kelly and, in attempting to arrest him, engaged him in a shootout which ended when he was

killed. R. 536, 546-47.

Late in the afternoon on the same day, two Houston police officers, E.T. Yanchak and C.W. Kent, arrived in New Orleans to interrogate Selvage about the two robbery-murders in Houston. Based on their previous investigation, they believed that Wilbur Kelly had fired the fatal shot in the Ventura's Jewelry robbery. As Detective Yanchak testified,

> Q. [At] th[at] time ... you knew from the statements taken from Eugene Wadis, Peanuts and Brenda Joseph that they said Wilbur Kelly did the shooting of Al Garza?
>
> A. Yes sir.
>
> Q. In your mind you knew Wilbur Kelly did the shooting of Albert Garza according to the statements you had?
>
> A. Yes sir.

R. 653. Detective Kent agreed that "there was no doubt about who did the killing," for he had "sufficient statements that

Wilbur Kelly had killed Albert Garza." R. 629.

For this reason, at the commencement of the interrogation of Mr. Selvage, Detective Kent told Selvage that Wilbur Kelly had been killed in a shootout with the New Orleans police that day. R. 614. He then told Selvage that if Kelly had fired the fatal shot at Officer Garza, he should get "the heat off his back" and tell the police what happened. R. 614-15; 653. Mr. Selvage responded by giving two confessions. In the first, he confessed to participating in the robbery of the Stop-and-Go market with Wilbur Kelly. In the second, he described his participation in the robbery of Ventura's Jewelry. He admitted firing his gun during the Ventura's robbery, but he said that Wilbur Kelly was the person who killed the people

in each robbery.[16]

SUMMARY OF ARGUMENT

Mr. Selvage's death sentence did not reflect a "reasoned moral response" to the evidence because the sentencing process failed to provide his jury with a vehicle to give mitigating effect to the evidence that he was addicted to mood-and-mind altering drugs at the time of the crime, and that he did not kill Deputy Garza.

The state courts' refusal to review this Penry claim on the merits does not amount to an "adequate and independent state law ground" precluding merits review in this Court. Penry invokes a long-recognized exception to the Texas contemporaneous objection rule that now allows the claim to be entertained on its

---

16 Even though the trial judge overruled Mr. Selvage's motion to suppress the confessions, R. 884, the prosecution did not thereafter introduce them at trial.

merits. In addition, because the Texas default rule has seldom been applied to bar untimely Penry-type claims, the state law ground is not "adequate." Further, since the state courts' default rule requires consideration of whether Penry announced a rule that was not recognized previously by the state court, the state law ground is not "independent."

In any event, Mr. Selvage shows cause for his failure to raise his Penry claim at his 1980 trial. By that time, the Texas Court of Criminal Appeals, relying upon decisions from this Court, had held repeatedly and unequivocally that no instructions beyond the special issues were needed to permit mitigation to be fully considered under the Texas capital scheme. No court decision from other states, or the federal courts, was available to help counsel construct an

argument to question in 1980 this hard-and-fast rule.

A miscarriage of justice will occur if the Court fails to review the Penry violation, which precluded the jury from taking into account the reasons Selvage should not have been sentenced to death, the most important constitutional requisite for a capital sentencing decision. But for this error, the jury would not have voted for death, for all the relevant evidence, including evidence not known to the jury, showed that Selvage's participation in the crime was induced and shaped by severe mental illness and that he killed no one.

ARGUMENT

I. NO ADEQUATE AND INDEPENDENT STATE GROUND BARS MR. SELVAGE'S PENRY CLAIM

Mr. Selvage presented his Penry[17]

---

[17] Penry v. Lynaugh, 106 L.Ed.2d 256 (1989).

claim for the first time in postconviction proceedings. Following the recommendation of the state habeas judge, the Texas Court of Criminal Appeals held that Selvage's failure to raise the claim at trial constituted a procedural default. See, JA. 34-35; 38-39. For this reason the court below, finding no "cause" for the default, refused to entertain the Penry claim on the merits.[18] JA. 77-78

Before reaching the "cause" inquiry under Wainwright v. Sykes, 433 U.S. 72 (1977), this Court must first conclude that the inquiry is necessary. A precondition to "cause and prejudice" analysis under Sykes is the existence of a state procedural bar that constitutes an

---

[18] The Fifth Circuit concluded: "a Federal habeas court cannot review a claimed error in the conduct of a state criminal trial when the state has refused review in reliance on its contemporaneous objection rule, absent cause and prejudice for failure to object. We find no legal cause for the absence of an objection." Id.

adequate and independent state-law ground for refusing to entertain a federal habeas petitioner's constitutional claims. Harris v. Reed, 103 L.Ed.2d 308 (1989). Thus, the threshold question for the Court to "consider [is] whether [Texas] ... law provides an adequate and independent state ground for the refusal to vacate petitioner's sentence." Johnson v. Mississippi, 100 L.Ed.2d 575, 585 (1988).[19]

There are two reasons why this Court should not uncritically accept the state court's now-outdated conclusion that Selvage's Penry claim is procedurally barred. First, because that conclusion preceded Penry, it is no longer viable as

---

[19] The Court has held consistently that "the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." Henry v. Mississippi, 379 U.S. 443, 447 (1965).

a matter of state law after Penry. Long-established Texas default jurisprudence provides for -- rather than forbids -- the belated entertainment of constitutional claims after they have been recognized in an authoritative decision of this Court postdating the claimant's trial. As we show below, no rule of Texas law presently bars Mr. Selvage from asserting his Penry claim at this stage of the case. Second, if a state-law ground were to be invoked as a bar to Selvage's Penry claim, its application to these circumstances would violate the principles that a state procedural rule must be applied "evenhandedly to all similar claims," Hathorn v. Lovorn, 457 U.S. 255, 263 (1982), and must not be substantively entangled with a ruling of federal constitutional law, in order to qualify as an "adequate" and "independent" state

ground.

A. Texas Law Excuses the Failure of a Criminal Defendant to Raise at Trial a Constitutional Claim Which Had Not Been Recognized at the Time of Trial But Is Subsequently Vindicated by This Court

For many years, the Texas Court of Criminal Appeals has recognized an important exception to its procedural default rule. As explained in Ex parte Chambers, 688 S.W.2d 483, 486 (Tex. Cr. App. 1984) (Campbell, J., concurring), "a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized" (emphasis added).[20] This exception has been held to apply with

---

[20] See also Cuevas v. State, 641 S.W.2d 558 (Tex. Cr. App. 1982); Boulware v. State, 542 S.W.2d 677 (Tex Cr. App. 1976); Ex parte Casarez, 508 S.W.2d 620 (Tex Cr. App. 1974); Ex parte Sanders, 580 S.W.2d 383 (Tex. Cr. App. 1979); Ex parte Taylor, 484 S.W.2d 748 (Tex. Cr. App. 1972).

particular force where "the new principles relied upon [by the defendant] overruled considerable Court of Criminal Appeals case law, or was, in fact, quite novel and an objection based upon it would have been futile." Chitwood v. State, 703 S.W.2d 360, 362 (Tex. Cr. App. 5th Dist. 1986) (emphasis added).

The Texas courts have repeatedly applied this exception and entertained otherwise defaulted constitutional claims after a decision of this Court has "overruled considerable Court of Criminal Appeals case law." Prior to this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981), for example, the Texas courts had frequently held that state psychiatric interviews with capital defendants resulting in testimony on future dangerousness implicated neither Fifth nor

Sixth Amendment interests.[21] After Smith was handed down, the Court of Criminal Appeals accordingly concluded that Smith announced a right it had not previously recognized,[22] and it began to entertain these claims on their merits without

---

21 See Smith v. State, 540 S.W.2d 693 (Tex. Cr. App.. 1976); Moore v. State, 542 S.W.2d 664 (Tex Cr. App. 1976); Livingston v. State, 542 S.W.2d 655 (Tex. Cr. App. 1976).

22 In Field v. State, 627 S.W.2d 714 (Tex. Cr. App. 1982) Justice McCormick described the effect of Smith upon Texas law:

> Both holdings in Estelle v. Smith changed the law in Texas. This Court had for years rejected claims on these bases. Never before had it been held that a court-appointed mental health expert must warn a defendant of his right to remain silent and that evidence adduced in the psychiatric interview could be used against him. Never before had it been held that the defendant (sic) attorney could receive notice before a psychiatric interview on the dangerousness issue could be held. In fact, in numerous cases this Court rejected the contentions that the proceedings used in Estelle v. Smith violated a defendant's rights.

627 S.W.2d at 723-24 (McCormick, J., concurring).

regard to whether defense counsel had noted a timely objection at trial. In case after case, it ignored capital defendants' failure to assert timely Smith claims and considered the merits of these claims. See, e.g., Ex parte Demouchette, 633 S.W.2d 879 (Tex. Cr. App. 1982)(claim not raised at trial or on direct appeal; relief granted in habeas proceedings); Ex parte Chambers, supra (no objection at trial; default found on direct appeal before Smith was decided, Chambers v. State, 568 S.W.2d 313, 325 (Tex. Cr. App. 1978) ("[n]o objection was made to any of the testimony now challenged[,] [n]othing is presented for review"); full relief granted in habeas proceedings); Ex parte Woods, 745 S.W.2d 21 (Tex. Cr. App. 1988)(trial counsel voiced general objection at 1976 trial; claim not raised on direct appeal; court reviewed merits of

claim in habeas proceedings); Powell v. State, 742 S.W.2d 353, 366 (Tex. Cr. App. 1987)(majority reached defaulted claim on merits and denied relief; dissenting Justice explained why the defaulted claim must be entertained on its merits: "[w]here a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver[,]" [cites omitted][;] "[t]his is now part of our state procedural default rule dealing with preservation of constitutional error").

The United States Court of Appeals for the Fifth Circuit has similarly applied this settled feature of Texas law. In Muñiz v. Procunier, 760 F.2d 588 (5th Cir. 1985), as here, the Texas Court of Criminal Appeals had held a death-sentenced inmate's pre-Smith claim

procedurally barred before the landmark decision of this Court establishing its merit. After that decision, the Fifth Circuit found that the bar no longer existed.

> Under the well-established Texas law in 1978 and 1979 the interview of the psychiatrist was held not to be testimonial or adversarial, thereby not implicating the Fifth or Sixth Amendments. [Citations omitted.] After Estelle v. Smith corrected these Texas holdings, the Texas Court of Criminal Appeals ruled that the failure to object at a trial conducted prior to the Supreme Court's decision constitutes no waiver of Estelle v. Smith violations....
>
> Where the state court has rejected petitioner's claim on grounds of procedural waiver under an incorrect view of the underlying law and where the state now applies no waiver under the circumstances, no consideration of comity would lead a federal court to bar the petitioner from presenting these claims.

Muniz v. Procunier, 760 F.2d at 589-90.

The same exception to procedural

default was held applicable in the wake of other decisions by this Court recognizing the validity of claims that Texas had earlier rejected. After Witherspoon v. Illinois, 391 U.S. 510 (1968),[23] and Adams v. Texas, 448 U.S. 38 (1980),[24] the Court of Criminal Appeals entertained previously defaulted claims and granted relief on them. It did so, too, after Burgett v. Texas, 389 U.S. 105 (1967),[25] and

---

23 See, e.g., Ocker v. State, 477 S.W.2d (Tex. Cr. App. 1972) (granting relief on unpreserved Witherspoon claim); Ex parte Martin, 479 S.W.2d 280 (Tex. Cr. App. 1972) (same); Boulware v. State, 542 S.W.2d 677, 681-82 (Tex. Cr. App. 1976) (explaining Ocker and Martin).

24 See, e.g., Cuevas v. State, 641 S.W.2d 558 (Tex. Cr. App. 1982) (granting relief on unpreserved Adams claim); Hartfield v. State, 645 S.W.2d 463 (Tex. Cr. App. 1980) (same).

25 See, e.g., Ex parte Cesarez, 508 S.W.2d 620, 622 (Tex. Cr. App. 1974) (granting relief on unpreserved Burgett claim); Ex parte Flores, 537 S.W.2d 458, 459 (Tex. Cr. App. 1976) (reviewing merits of unpreserved Burgett claim); Ex parte Hall, 546 S.W.2d 303, 304 (Tex Cr. App.1977) (same); Ex parte Ropollo, 550 S.W.2d 869, 871 (Tex. Cr. App. 1977) (same).

Washington v. Texas, 388 U.S. 143 (1967).[26]

Since Penry v. Lynaugh plainly upset an unbroken line of Texas caselaw refusing to require any sort of supplemental instructions on mitigation despite Jurek v. Texas, 428 U.S. 262 (1976), and Lockett v. Ohio, 438 U.S. 586 (1978), [27] it is not surprising that the Court of Criminal Appeals is now treating post-Penry claims exactly as it treated post-Smith claims, post-Witherspoon claims, and so forth. In its first opinion after Penry, it reached the merits of a Penry claim although noting "that appellant did not request additional instructions regarding mitigating evidence during the punishment phase of the trial." Callins v. State,

---

26 See, e.g., Ex parte Turner, 542 S.W.2d 187, 189 (Tex Cr. App. 1976) (reviewing merits of unpreserved Washington claim).

27 See Point II, infra.

No. 69,023 ___ S.W.2d ___ (Tex. Cr. App. September 27, 1989)(slip op. at 15). It explained that "[i]n Penry v. Lynaugh, ... the United States Supreme Court held the Texas capital murder statute unconstitutional 'as applied' in the face of a challenge based on the lack of instructions concerning mitigating circumstances," id. at 16, and it therefore undertook to consider whether Callins' mitigating evidence, like Penry's, constitutionally required "an additional instruction to the jury." Id. at 17.

Since Texas law no longer holds Mr. Selvage's Penry claim procedurally barred,[28] a federal court must hear it.

---

28 Respondent argues that two recent Court of Criminal Appeals decisions have abandoned the rule of Ex parte Chambers and adopted one like that of Engle v. Isaac, 456 U.S. 107 (1982). See Respondent's Opposition To Motions To Certify Question To Texas Court of Criminal Appeals And To Suspend Briefing And Further Consideration of Case

As the Fifth Circuit wrote in Muniz v. Procunier, supra, "no consideration of comity would lead a federal court to bar the ... claim[]" under these circumstances. 760 F.2d at 590.

B. Any State-Law Bar Would Not Be "Adequate," as It Is Enforced Neither Consistently nor Strictly; Nor Would It Be "Independent," as It Depends upon a Federal Constitutional Ruling

This Court has consistently recognized that only state rules which are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights." James v. Kentucky, 466 U.S. 341, 349-350 (1984). "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar cases." Barr v. City of Columbia, 378 U.S. 146, 149 (1964). Because the Texas courts have no "firmly established" or "regularly followed" rule barring the entertainment of claims like Mr. Selvage's unless raised by an objection at trial, any state-law bar interposed against his Penry claim cannot be "adequate" so as to preclude a review of the claim on the merits.

---

at 3-8, citing Williams v. State, 773 S.W.2d 525 (Tex. Cr. App. 1988), and Mathews v. State, 768 S.W.2d 731 (Tex. Cr. App. 1989). This is simply wrong. In both Williams and Mathews, the Court of Criminal Appeals held that because Batson v. Kentucky, 476 U.S. 179 (1986), did not recognize a new right but merely adjusted the evidentiary burden a criminal defendant must meet to prove an equal protection claim based on racial discrimination in jury selection, the exception to the default rule recognized in Ex parte Chambers did not apply to such claims. While the original opinion in Williams could be read as suggesting that the Court was forsaking its own Chambers rule and adopting a standard more like Engle's, the majority in Mathews rejected this approach and asserted once again that Chambers correctly states Texas' default law. On rehearing, a majority of the Williams court accepted Mathews. And since Williams the Court of Criminal Appeals has again reaffirmed the Chambers rule, James v. State, 772 S.W.2d 84 (Tex. Cr. App. 1989), noting that "Chambers sets out the test which determines when a judicial decision, decided subsequent to a defendant's trial, relieves that defendant from making a contemporaneous objection." Id. at 101.

We have shown in the preceding subsection that Texas law provides a well-established exemption from procedural default in circumstances like Selvage's, where a supervening decision of this Court upsets a chain of Texas precedents rejecting a federal constitutional claim. And indeed, even without the supervening decision, Texas' procedural-default rule is more often honored in the breach than in the observance.

In Williams v. State, 674 S.W.2d 315 (Tex. Cr. App. 1984), for example, Williams claimed that the absence of instructions beyond the special issues "so limited the deliberateness issue as to no longer include proper consideration of mitigating circumstances or meet Constitutional requirements to protect against 'a wanton and freakish assessment of the death penalty.'" Id. at 321.

Noting that "appellant did not request any charges, nor did he object to those given," the court nevertheless examined the claim and denied relief on the merits. Id.

In Stewart v. State, 686 S.W.2d 118 (Tex. Cr. App. 1984), Stewart contended that because the Texas statute "contains no provisions for directing and instructing the jury's consideration of mitigating circumstances," id. at 121, it violates the Eighth and Fourteenth Amendments. After noting that "appellant never requested the trial court to charge on mitigation," the Court of Criminal Appeals concluded that "no jury charge regarding evidence of any mitigating circumstances was necessary since the questions prescribed under Article 37.071 clearly allow the jury to grasp the logical relevance of mitigating evidence."

Id.

In several other cases before and after Williams and Stewart, the Court of Criminal Appeals has similarly overlooked procedural default and reached the merits of claims akin to Mr. Selvage's.[29] Indeed, before Selvage's case, the Court of Criminal Appeals had rarely indicated

---

29 See, e.g., Johnson v. State, 691 S.W.2d 619, 626 (Tex. Cr. App. 1984) (appellant claimed trial court's charge violated Eighth Amendment because it did "not clearly guide the jury in understanding mitigating circumstances and their purpose and of their option to recommend life imprisonment even though aggravating circumstances are found"; claim raised for the first time on appeal; court holds trial court's charge "correctly instructed the jury on the law"); Clark v. State, 717 S.W.2d 910, 920 (Tex. Cr. App. 1986) (appellant argued lack of instructions on mitigation created risk that jury did not "consider and weigh" mitigating circumstances in answering penalty questions; overlooking lack of request for "any" instructions, court holds instructions adequate); Sosa v. State, 769 S.W.2d 909, 916 (Tex. Cr. App. 1989) ("appellant argues fundamental error occurred when the trial court failed to instruct the jury . . . that they could consider mitigating circumstances in their deliberations on the special issues"; no objection; court reaches merits and denies relief); Motley v. State, 773 S.W.2d 283 (Tex. Cr. App. 1989) (same); see also Adams v. State, 577 S.W.2d 717, 729-730 (Tex. Cr. App. 1979).

that a failure to object at trial would bar constitutional claims based upon the insufficiency of instructions on mitigation.[30] This pattern of decisions stands in sharp contrast to the Florida practice reviewed in Dugger v. Adams, 103 L.Ed.2d 435 (1989), where the Court found that "[i]n the vast majority of cases, the Florida Supreme Court had faithfully applied its rule" of procedural default. Id. at 445 n.6. Here, the "vast majority of cases" shows that the Texas court has habitually overlooked the lack of a timely

---

30 In Fierro v. State, 706 S.W.2d 310, 318 (Tex. Cr. App. 1986), Fierro contended on direct appeal that his death sentence should be vacated, inter alia, because the trial court failed to charge the jury on mitigating evidence. Noting there was no "special requested charge on mitigating evidence," the court held "[n]othing is presented for review." Id. The court thereafter looked at the merits of the issue and concluded "[t]here is nothing to show that the jury was prevented from considering" the mitigating evidence. Id. See also Williams v. State, 622 S.W.2d 116 (Tex. Cr. App. 1981) (same).

objection and reached the merits of Penry-like claims. Because a state court cannot "avoid deciding federal issues by invoking procedural rules that [it does] ... not apply evenhandedly to all similar cases," Barr v. City of Columbia, supra, 378 U.S. at 149, any state procedural bar in Mr. Selvage's case would not be an "adequate" ground of decision.

Nor would it be an "independent" state ground. This Court has long held that "when the resolution of the state procedural rule depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law...." Ake v. Oklahoma, 470 U.S. 68, 75 (1985). See also Herb v. Pitcairn, 324 U.S. 117 (1945). As we have shown above, the Court of Criminal Appeals does not enforce its contemporaneous objection rule when, inter

alia, decisions of this Court announce a right that the Texas courts had not previously recognized. In this respect, the Texas default rule works in the same way as the one this Court considered in Ake. There, Oklahoma law had been construed to allow review of defaulted claims falling in the category of "fundamental trial error." Federal constitutional error was expressly recognized as constituting fundamental error. 470 U.S. at 74-75. This Court rejected Oklahoma's argument that the refusal of the state's highest court to review the defaulted federal issue constituted an adequate and independent state law ground because "the State has made application of the procedural bar depend on an antecedent ruling on federal law.... " Id. Here, too, the interrelationship of state law and federal

constitutional rulings precludes a finding that any state procedural bar applied to Mr. Selvage would be "independent" and sufficient to preclude decision on the merits.

II. MR. SELVAGE'S FAILURE TO RAISE A PENRY CLAIM AT TRIAL SHOULD BE EXCUSED FOR "CAUSE" SINCE THAT CLAIM WAS NOT REASONABLY AVAILABLE TO COUNSEL

In Wainwright v. Sykes, 433 U.S. 72 (1977), the Court adopted the "cause and prejudice" requirement of Francis v. Henderson, 425 U.S. 536 (1976), for all petitioners seeking federal habeas relief on constitutional claims defaulted in the state courts. The Sykes Court did not elaborate upon this requirement, but rather left open "for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard." 433 U.S. at 87. Subsequently, in Reed v. Ross, 468 U.S. 1 (1984), the Court

explained that although a "tactical" or "intentional" decision to forego a procedural opportunity normally cannot constitute cause, id. at 13-14, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." Id. at 14.

Mr. Selvage submits that there was "cause" under Reed for his trial counsel's failure to make the contentions later vindicated in Penry v. Lynaugh, supra, because the Penry issue was so totally foreclosed at the time of his trial that his attorney could not reasonably have been expected to raise it. Penry squarely falls into that category of decisions identified in Reed as creating a claim that was not reasonably available to trial counsel beforehand inasmuch as it "'disapprov[ed] a practice this Court

arguably ha[d] sanctioned in prior cases.'" 468 U.S. at 17 (quoting United States v. Johnson, 457 U.S. 537, 551 (1982)). In this situation, Reed teaches that whether the failure of a defendant's attorney to have raised an issue is sufficiently excused by "cause" depends upon "how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of the defense counsel's failure to challenge it, and how strong the available support [was] from sources opposing the prevailing practice." Id. at 17-18.

At the time of Mr. Selvage's trial, two decisions of this Court appeared to foreclose any colorable contention that Texas' statutory procedure of submitting three "special issues" to the jury as the sole questions for its determination at

sentencing interfered with the Eighth and Fourteenth Amendments' requirement of consideration of mitigating circumstances.

In Jurek v. Texas, 428 U.S. 262 (1976), the Court specifically took note of the Texas statute's potential for precluding the jury's consideration of mitigating circumstances, but reasoned that "the constitutionality of the Texas procedures turn[ed] on whether the enumerated questions allow[ed] consideration of particularized mitigating factors." Id. at 272. The Court upheld the statute under special issue number two, which "asks the jury to determine 'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' if he were not sentenced to death," id., because

> [t]he Texas Court of Criminal Appeals has ... indicated that

> it will interpret [the future dangerousness] question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show[.]

Id. The Court's rationale did not call for Texas to permit supplemental jury instructions; it was enough that "Texas law [allows] . . . the jury [to] be asked to consider whatever evidence of mitigating circumstances the defense can bring before it." Id. at 273.

The Court once again approved the Texas statute two years later in Lockett v. Ohio, 438 U.S. 586 (1978), while striking down an Ohio law that permitted only a limited range of mitigating circumstances to be considered in capital sentencing. The infirmities of the Ohio law were highlighted by comparing it to the Texas statute approved in Jurek. The Court noted that the Texas statute had survived constitutional attack "because

three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question -- despite its facial narrowness -- so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." 438 U.S. at 607 (citing Jurek, 428 U.S. at 272-73). Thus, the Texas statute could not be found to "prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," Lockett, 438 U.S. at 607.

Nowhere did Jurek or Lockett say that Texas was constitutionally required to give supplemental jury instructions where the wording of its special issues would result in a jury not being able fully to consider particular mitigating evidence. To the contrary, the Court appeared to

hold that a Texas jury could give constitutional consideration to a defendant's mitigating evidence within the framework of the statutory "special issues" because the Texas Court of Criminal Appeals had "broadly interpreted" these special issues. Texas courts and legal practitioners accordingly read Jurek and Lockett as sanctioning Texas' practice of denying any and all supplemental instructions that would permit its juries to give effect to mitigating evidence outside the channels of the three special issues.

For example, King v. State, 553 S.W.2d 105 (Tex. Cr. App. 1977), cert. denied, 434 U.S. 1088 (1978), squarely rejected the argument "that the jury will not have adequate guidelines to assist its [reasoned moral judgment] ... unless definitions for the terms contained [in

the special issues] are provided in the jury charge." Id. at 107. The King court reasoned that in Jurek this Court had "concluded that the submission of the [special] issues provided by [statute] . . . constitutionally guided the jury's determination of the punishment" and, therefore, "[n]o special definitions of the terms of that statute were required." Id.[31]

Similarly, in Ex parte Granviel, 561

---

31 The inflexibility of Texas' practice is demonstrated by numerous cases, decided prior to Mr. Selvage's trial, in which the Texas Court of Criminal Appeals refused to provide any further definition for words and phrases within the special issues. See Gholson v. State, 542 S.W.2d 395, 397 (Tex. Cr. App. 1976) (1977) (challenge to future dangerousness question on grounds of its vagueness rejected); Collins v. State, 548 S.W.2d 368, 374 (Tex. Cr. App. 1976)(same); Granviel v. State, 552 S.W.2d 107, 117 (Tex. Cr. App. 1976)(meaning of the term "a probability" in the future dangerousness question deemed not vague or overbroad); Blansett v. State, 556 S.W.2d 322, 329 (Tex. Cr. App. 1977) (rejected claim that vagueness of future dangerousness question resulted in jury having unlimited discretion); Obryan v. State, 591 S.W.2d 464, 475 (Tex. Cr. App. 1979)(same).

S.W.2d 503 (Tex. Cr. App. 1978), the court rejected a claim that, in light of Texas' rigid practice of instructing juries in the exact wording of Article 37.071, the Texas statute "as applied is unconstitutional because it prevents the jury from considering a defendant's mental condition as a mitigating factor in relation to the two or possibly three statutory special issues to be submitted to the jury at the penalty stage of a capital murder trial." Id. at 516. The basis for this rejection was that since "the jury in answering the special issues may properly consider all the evidence adduced[,]" the statute "does not prevent the jury from considering a defendant's mental condition as a mitigating factor." Id.

In Adams v. State, 577 S.W.2d 717 (Tex. Cr. App. 1979), rev'd on other

grounds sub nom. Adams v. Texas, 448 U.S. 38 (1980), the Court of Criminal Appeals rejected an argument "that [mitigating] evidence is of no avail to the defendant if the jury is convinced by the evidence ... that the punishment issues should be answered affirmatively," because "the punishment of death is [then] mandatory even though the jury, on the basis of the mitigating evidence, may believe that death is inappropriate." 577 S.W.2d at 729. Citing Jurek and Lockett, the court concluded that it was sufficient that the Texas statute, in guiding the jury's discretion, made it possible for the defendant to present all mitigating evidence for the jury's consideration. Id. at 729-30.

Finally, in Quinones v. State, 592 S.W.2d 933 (Tex. Cr. App. 1980) -- less than one month before Selvage's trial--

the court rejected a claim that "an explanatory charge is necessary to keep the jury from disregarding the [mitigating] evidence properly before it." Id. at 947. Examining Jurek and Lockett, the court reasoned:

> Appellant correctly claims a right to consideration of mitigating circumstances by the jury deciding whether or not to impose the death penalty and he argues that the explanatory charge he requested is necessary to protect this right. We disagree with this conclusion. The Supreme Court has affirmed that . . . "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all [mitigating] evidence will be adduced." [Jurek v. Texas,] 428 U.S. at 276.... The question then is whether the language of the special issue is so complex that an explanatory charge is necessary to keep the jury from disregarding the evidence properly before it.... The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future

> criminal acts of violence. No additional charge is required.

592 S.W.2d at 947.

Therefore, at the time of Mr. Selvage's trial, the Texas courts' position was unequivocal and firmly settled: the "assurance upon which Jurek was based," Penry, 106 L.Ed.2d at 278, had already been fulfilled by the procedure of admitting a wide range of mitigating evidence as pertinent to special issue number two. Since the Texas statute was unique to that State, no cases from other jurisdictions offered Mr. Selvage's counsel any legal "tools" for presenting a Penry-type claim to the courts. Moreover, there was no support in federal caselaw for a reading of Jurek and Lockett that differed from the Texas courts' consistent reading of those decisions. The only federal case that ever discussed a challenge to Texas' practice at the time

Mr. Selvage was tried also relied squarely upon Jurek and Lockett in rejecting that challenge. See Granviel v. Estelle, No. CA-4-78-115 (N.D. Tx. Jan. 26, 1979). Hence, it was reasonably apparent that no further modification of the special-issue procedure, such as Texas' providing for supplemental jury instructions, was constitutionally demanded.

The situation confronting Mr. Selvage's counsel at the time of trial was thus one of total foreclosure, not mere "futility," as that term was used in Engle v. Isaac, 456 U.S. 107 (1982). In Engle, the Court rejected criminal defendants' arguments that they could not have realized at the time of their trials that the Due Process Clause was at odds with the Ohio statute requiring them to prove self-defense by a preponderance of the evidence and that, in any event, their

objecting to the statutory requirement at trial would have been futile because the Ohio rule had been in place for over a century.

The Court in Engle held that the legal foundation for the defendants' due process claim had been laid almost five years prior to the first of their trials in In re Winship, 397 U.S. 358 (1970), where the Court ruled that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364. The Court further noted that during those five years dozens of defendants in other states had used the Winship opinion to challenge successfully the constitutionality of rules requiring them to bear a burden of proof -- most often,

rules embodying well-established principles of law. In light of this history, the Court concluded that it could not be said that the Engle defendants had lacked the legal "tools" to fashion their claim. 456 U.S. at 132-33.

In dismissing the contention that any objection to the Ohio statute would have been fruitless, the Court held that "futility ... cannot alone constitute cause for a failure to object at trial." Id. at 130. Under the circumstances, where a time-honored Ohio practice had been called into serious question by a latter-day constitutional development and the Ohio courts had not yet been given the opportunity to reconsider settled state practice in the light of potentially supervening federal law, the Court observed that "[e]ven a state court that has previously rejected a constitutional

argument may decide, upon reflection, that the contention is valid," 456 U.S. at 130, and should be given a chance to do so.

In stark contrast, the legal landscape facing Mr. Selvage's counsel when he tried the issue of punishment in February of 1980 was totally uncompromising. The Court's Jurek and Lockett opinions had not called into question the Texas practice of instructing juries solely on the three special issues, and they could most readily be viewed as having sanctioned that practice. Jurek and Lockett had clearly foreclosed any challenge to the Texas statute's facial narrowness, and they had done so on the theory that the Texas courts' capacious reading of the special issues permitted capital defendants to present unlimited

mitigating evidence to the jury. Repeatedly asked to read Jurek's and Lockett's mandate of a "broad interpretation" of the special issues as requiring supplemental jury instructions when appropriate, the Texas courts had consistently read Jurek and Lockett to mean that Texas had sufficiently complied with constitutional requirements by admitting a broad range of evidence bearing on the question of future dangerousness, and that no further jury instructions allowing consideration of mitigating evidence outside the framework of the special issues was constitutionally required.

Since there was no reason for Mr. Selvage's counsel to believe that a challenge to the Texas courts' holdings

would find favor in the federal courts,[32] his failure to raise a pre-Penry claim in state court had nothing to do with erecting "a hedge against ... strategic risks," Reed, 468 U.S. at 14, in state courts "unsympathetic to the claim," Engle, 456 U.S. at 130. He had no "strategic motives of any sort" to manipulate the issue. Reed, 468 U.S. at 15. Simply put, Mr. Selvage's counsel reasonably believed that the issue was

---

32 At the time of Mr. Selvage's trial, Granviel v. Estelle, supra, had rejected a challenge to Texas' practice. Moreover, this Court had denied certiorari on direct review of Texas decisions refusing to grant supplemental jury instructions, see King v. Texas, 434 U.S. 1088 (1978), and rejecting challenges to the vagueness of the future dangerousness question. See Gholson v. Texas, 432 U.S. 911 (1977); Granviel v. Texas, 431 U.S. 933 (1977); Collins v. Texas, 430 U.S. 959 (1977). Although denials of certiorari do not necessarily mean that the Court is in agreement with the decisions below, reasonable counsel would have concluded that federal review of the issues on which certiorari was denied was hardly likely, because the Court had re-affirmed Jurek in its Lockett opinion within a year after the denials of certiorari in King, Gholson, Granviel and Collins.

"dead." He saw no justification to raise a wholly frivolous claim.[33] This Court has noted that, under similar circumstances, "we [would] actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." Reed, 468 U.S. at 16 (footnote omitted).

To require that Mr. Selvage's counsel raise a Penry-type claim at the time of trial would have meant that counsel was expected to make a legally frivolous contention. This Court has never encouraged -- let alone demanded-- anything of the sort. Cf. Jones v.

---

33 In its pleadings submitted to the United States Court of Appeals for the Fifth Circuit in Penry, Texas had argued that the Penry issue was "frivolous," Brief for Attorney General at 19, as well as "baseless," id., and "without merit." Id. at 21, 22.

Barnes, 463 U.S. 745 (1983). As it recognized in the context of Reed:

> 'Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may legitimately be regarded as debatable.'

468 U.S. at 16 (quoting Judge Haynsworth below).

Since Jurek and Lockett had apparently sanctioned Texas' special issue procedure, and the Texas courts had repeatedly interpreted those cases as foreclosing any type of Penry claim at the time Mr. Selvage was tried, Engle's command that a state court should be given the chance to rethink its position in light of federal law had been fully honored here. The Texas Court of Criminal Appeals was in fact given many

opportunities to re-examine its interpretation of Jurek and Lockett. It refused them time after time. King, 533 S.W.2d at 107; Adams, 577 S.W.2d at 729-30; Quinones, 592 S.W.2d at 947. At some point, surely, the Texas Court of Criminal Appeals was entitled to be taken at its word and no longer dunned by demands to change its recent decisions.[34]

---

[34] See, e.g., Roberts v. LaVallee, 389 U.S. 40, 42-43 (1967), holding in an analogous setting that state courts need not be repeatedly asked to reconsider claims they have rejected. See also Nix v. Whiteside, 475 U.S. 157, 163 n.3 (1986)(Sixth Amendment claim not pressed before Iowa Supreme Court deemed exhausted since further proceedings would be futile); Duckworth v. Serrano, 454 U.S. 1, 3 (1981)(exception to exhaustion requirement recognized when "corrective process is so clearly deficient as to render futile any effort to obtain relief"); Blackledge v. Perry, 417 U.S. 21, 23-24 (1974)(futility found because North Carolina Supreme Court "had consistently rejected" similar claims); Brown v. Allen, 344 U.S. 443, 449 n.3 (1952)(in the exhaustion of state remedies, "we do not believe that Congress intended to require repetitious applications to state courts"); Wade v. Mayo, 334 U.S. 672, 682 (1948)(once one of two possible remedies has been exhausted to no avail, it is unnecessary, because likely futile, to invoke second remedy).

Ultimately, to be sure, this Court discovered the latent constitutional defect rooted in the application of the Texas statute, ruling in Penry that criminal defendants are entitled to supplemental jury instructions when necessary to prevent the jury from taking too narrow a view of mitigating circumstances. The Penry decision emanated from the Court's understanding of the promise of Jurek, "namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all the relevant mitigating evidence a defendant might present in imposing sentence." 106 L.Ed.2d at 276. Therefore, Penry was not deemed to be "new law" for purposes of Teague v. Lane, 103 L.Ed.2d 334 (1989); rather, the Court viewed it as the kind of evolutional elaboration of Jurek, in the light of

Lockett, that should enure to the benefit of all capital defendants whose cases became final after Lockett, in order to respect "'the constitutional standards that prevailed at the time the original proceedings took place,'" Teague, 103 L.Ed.2d at 353 (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969)(Harlan, J., dissenting)).

Penry read Jurek and Lockett as embodying the "assurance" that Texas capital defendants would have the opportunity for full consideration of their mitigating evidence even if Texas' special-issues procedure had to be altered to achieve this result. 106 L.Ed.2d at 276. But between the time of Jurek and the time of Penry, the Texas courts and legal practitioners had reasonably taken just the opposite view. In recognizing this fact, there is no inconsistency

between seeing that in retrospect Jurek foretold Penry and seeing that in prospect Jurek, as interpreted by the Texas court, foreclosed Penry-type claims. In exactly the same manner, Hitchcock v. Dugger, 481 U.S. 393 (1987), appeared to the Court to be a simple and uncontroversial application of Lockett; but from the standpoint of Florida judges and criminal practitioners, Hitchcock so thoroughly changed settled rules of state practice that the Florida Supreme Court appropriately recognized that Hitchcock claims could not properly be held to be procedurally barred for counsel's failure to raise them in anticipation of the Hitchcock decision. See Thompson v. Dugger, 515 So.2d 173, 175 (Fla. 1987)("[w]e find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its

Hitchcock opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default"). Accord, Hargrave v. Dugger, 832 F.2d 1528, 1533 (11th Cir. 1987).

An instructive parallel is the Court's recognition in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958), that "a local procedural rule, although it may . . . appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot [constitute an independent and adequate state ground barring Supreme Court review] . . ., because [litigants] . . . could not fairly be deemed to have been apprised of its existence." Similarly, the emergence of constitutional claims that seem consistent with precedent in hindsight--

as part of the evolutionary process described by Justice Harlan in Desist v. United States, 394 U.S. at 264, by which the meanings of "fundamental principles . . . are altered slowly and subtly as generation succeeds generation" -- may nonetheless be so inconceivable to legal practitioners immersed in a system as to be beyond the range of the claims that they are reasonably expected to urge upon a court.

Because a Penry-type contention was such a claim at the time of Mr. Selvage's trial, his counsel's failure to raise the issue should be excused for cause.

III. THE APPLICATION OF A PROCEDURAL BAR TO MR. SELVAGE'S PENRY CLAIM WOULD RESULT IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE

A. The Concept Of "Fundamental Miscarriage Of Justice" Cannot Be Limited To Constitutional Violations Which Have "Probably Resulted In The Conviction Of One Who Is Actually Innocent"

The Court has recognized that "'[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" Murray v. Carrier, 477 U.S. 478, 495 (1986) (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)). Even though in most cases, "'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard,'" id. at 495-96, the Court "do[es] not pretend that this will always be true." Id. at 496. In "an extraordinary case," therefore,

where "application of the cause and prejudice test will . . . result in a 'fundamental miscarriage of justice,'" Smith v. Murray, 477 U.S. 527, 537-38 (1986) (quoting Engle v. Isaac, supra)), the merits of an otherwise procedurally-barred constitutional claim must be decided. If the Court concludes that the state-court default ruling in Mr. Selvage's case survives Penry as a matter of state law, that its application in the post-Penry context constitutes an adequate and independent state procedural ground, and that Selvage has not shown cause for his default, the Court must decide whether his is the "extraordinary case" in which the miscarriage of justice exception should apply.

The primary definition which the Court has given thus far to the fundamental miscarriage of justice

exception is that it applies in cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," Murray v. Carrier, 477 U.S. at 496, or to the counterpart of this category of cases in the capital sentencing context. Smith v. Murray, 477 U.S. at 537-38.[35] While Carrier might be read to hold that the miscarriage of justice exception is limited to claims involving actually innocent prisoners, or to prisoners actually undeserving of the death sentence, a careful reading of Carrier demonstrates that it does not limit the exception to such claims. Moreover, the

---

35 The ultimate factual question in a capital sentencing proceeding which parallels the question of actual innocence is whether the defendant is "actually [or factually] undeserving of the death sentence." See Ledewitz, Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence, 24 Crim. L. Bull. 379, 400 (1989).

exception should not be so limited, for a concern with the accuracy of the conviction or sentence is only one of the concerns that has informed the Court's judgment in other areas in which it has had to balance the right of a habeas petitioner to relief against the procedural obstacles to obtaining that relief.

Carrier's particular formulation of the miscarriage of justice exception arose in response to Justice Stevens' concurring opinion. See Murray v. Carrier, 477 U.S. at 492-97. The majority in Carrier interpreted his concurrence as calling for the application of the miscarriage of justice exception to any constitutional claim "that call[s] into question the reliability of an adjudication of legal guilt." 477 U.S. at 495. Noting that "the defaulted claims in

Engle, no less than respondent's claim in this case, did involve issues bearing on the reliability of the verdict," id.,[36] the Court refused to extend the miscarriage of justice exception to such claims solely because they called into question the accuracy of the determination of guilt. Id.

The Court did not exclude altogether, however, the possibility that claims involving the unreliability of the verdict could call for application of the miscarriage of justice exception. In a case of extreme unreliability -- "where a constitutional violation has probably

---

[36] In Engle, the habeas petitioner's claim was that the Ohio instruction requiring the defendant to prove self-defense impermissibly shifted the state's burden of proof to the defendant because in Ohio self-defense negates the "purposeful conduct" element of the crime. In Carrier, the claim was that the trial court deprived the defendant of due process by precluding him from examining the rape victim's statements to the police for possible exculpatory evidence.

resulted in the conviction of one who is actually innocent" -- the Court held that the miscarriage of justice exception would be available.

Thus, in Carrier the Court did no more than formulate the miscarriage of justice test for constitutional claims whose only connection to fundamental unfairness is the very substantial risk that they have caused an unreliable result at trial. The concept of fundamental miscarriage of justice, or fundamental unfairness, however, has never been limited to errors which have actually infected the reliability of the trial.

In formulating the doctrine of harmless error, for example, the Court has recognized that "some constitutional errors require reversal without regard to the evidence in the particular case," Rose v. Clark, 478 U.S. 570, 577 (1986),

because "some errors necessarily render a trial fundamentally unfair." Id. The errors which fall into this category are errors which deprive the defendant of the right to a "basic trial process," id. at 578 n.6, a proceeding

> at which the defendant, represented by counsel, may present evidence and argument before an impartial jury and judge.

Id. at 578.

Further, in the companion procedural default case to Murray v. Carrier -- Smith v. Murray -- the Court's discussion of the "fundamental miscarriage of justice" exception to the procedural default rule was not focused at all on the defendant's "actual innocence" of the death sentence. Instead, it was focused on aspects of what the Court in Rose v. Clark called "the basic trial process." Thus, the Court concluded that Smith's claim of

constitutional error[37] did not involve a fundamental miscarriage of justice because the claimed error "neither precluded the development of true facts nor resulted in the admission of false ones," 477 U.S. at 538, and "did not serve to pervert the jury's deliberations concerning the ultimate question whether in fact petitioner constituted a continuing threat to society." Id. (emphasis in original). The test for fundamental miscarriage of justice thus was not limited to the Carrier question -- whether Smith was actually undeserving of the death sentence -- but included whether the constitutional error deprived him of such basic trial processes that it necessarily

---

37 Smith claimed that the admission of psychiatric testimony at the sentencing phase of his capital trial to support a finding of future dangerousness violated his Fifth and Sixth Amendment rights in a manner later condemned in Estelle v. Smith, 451 U.S. 454 (1981).

rendered his trial unfair or its result unreliable.[38]

Similarly, in determining whether a state's interest in the finality of a criminal judgment should preclude the retroactive application of a "new rule" of constitutional law, the Court has focused on the rule, not on the specific, actual effects of its non-application in the petitioner's case. Teague v. Lane, 103 L.Ed.2d at 357-59 (plurality opinion). Thus, in Teague the plurality held that a new constitutional rule would be applied

---

[38] Notably, Judge Henry Friendly, upon whom the Court relied in formulating the "actual innocence" component of the miscarriage of justice exception, see Smith v. Murray, 477 U.S. at 539 (citing Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi. L. Rev. 142 (1970)), himself disavowed the need for a showing of actual innocence when the constitutional error involves a component of the "basic trial process." See Friendly, op. cit., supra, at 151-53 ("one can hardly quarrel with the proposition that if a state does not afford a proper way of raising a constitutional defense at trial, it must afford one thereafter, and this without a colorable showing of innocence by the defendant").

retroactively if the failure to honor the newly-recognized right at trial "undermine[d] the fundamental fairness that must underlie a conviction or seriously diminish[ed] the likelihood of obtaining an accurate conviction." 103 L.Ed.2d at 359. As in Smith v. Murray, the concern for fairness underlying retroactivity determinations was a concern for whether the defendant was afforded a "basic trial process," Rose v. Clark, supra, not solely a concern about the defendant's actual innocence.

Accordingly, the "fundamental miscarriage of justice" exception to the procedural default rule must encompass constitutional errors which have deprived the defendant of a "basic trial process," in addition to those which, in a particular case, have "probably resulted in the conviction of one who is actually

innocent."

B. The Penry Error In Mr. Selvage's Trial Involves A Fundamental Miscarriage Of Justice

No matter what perspective the Court utilizes to measure the Penry error in Mr. Selvage's trial, the Court will find that the error presents a fundamental miscarriage of justice. It involves a deprivation of the most important constitutional right available to a defendant in a capital sentencing trial: the right to put on a defense -- to be heard as to why the death sentence should not be imposed. It involves, in particular, a rigid sentencing framework which prevented Mr. Selvage's jury from considering the two most powerful reasons for a capital sentencer not to impose the death sentence: severe physical, mental, and emotional disabilities which substantially decrease the defendant's

blameworthiness for the crime, and the fact that the defendant did not personally kill or procure the death of the victim of the capital murder. Finally it involves a defendant who, on the basis of all the relevant evidence, does not deserve a death sentence. In the remainder of this argument, Mr. Selvage will address each of these perspectives in more detail after first discussing the substance of the Penry violation in his trial.

i. The Penry Violation in Mr. Selvage's Trial

In Penry, the Court agreed with the petitioner's argument

> that his mitigating evidence of mental retardation and childhood abuse ha[d] relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment.

106 L.Ed.2d at 280. Mr. Selvage's

mitigating evidence was different from the evidence in Penry. Selvage relied on evidence of his drug addiction and the absence of any evidence that he fired the shot that killed Deputy Garza. Despite these differences, the special issues operated in Mr. Selvage's case just like they did in Penry. Their limited scope foreclosed any meaningful consideration by the jury of the mitigating weight of this evidence, because the evidence "ha[d] relevance to [Selvage's] moral culpability beyond the scope of the special issues." Penry, supra.

The evidence of Mr. Selvage's drug addiction was proffered by the defense as relevant to special issue two. However, like the petitioner's mental retardation in Penry, this evidence was "a two-edged sword: it ... diminish[ed] his blameworthiness for his crime even as it

indicate[d] that there is a probability that he will be dangerous in the future." Penry v. Lynaugh, 106 L.Ed.2d at 281. To the extent that drug addiction took away John Selvage's "free will," R. 2957, a reasonable juror certainly could have found that it reduced his moral culpability. See Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986) (opinion concurring in judgment) ("[s]ociety's legitimate desire for retribution is less strong with respect to ... defendants who have reduced capacity for considered choice"). However, since he never committed a crime before becoming an addict, a reasonable juror could also have found that the drug addiction -- proffered as the reason he committed all of his crimes -- plainly made it more likely that he would continue to commit crimes. Thus, even though the evidence of

drug addiction diminished Selvage's moral culpability, it -- like Johnny Penry's mental retardation -- also "suggest[ed] a 'yes' answer to the question of future dangerousness." Penry v. Lynaugh, 106 L.Ed.2d at 281. Because of this, "[t]he second special issue ... did not provide a vehicle for the jury to give mitigating effect to [Selvage's evidence of drug addiction]." Id. at 282.[39]

---

39 The evidence of drug addiction might also have called for a "no" answer to special issue one, because the effects of drug intoxication might have been found to reduce the deliberateness of Selvage's particular criminal behavior. However, the defense did not make this argument. In similar circumstances, the concurring Justices in Franklin v. Lynaugh, 101 L.Ed.2d 155, 173-74 (1988), found that the jury's ability to consider the mitigating evidence had to be analyzed in accord with how it was proffered by the defense. As proffered here, the evidence of drug addiction demonstrated only that Selvage was drawn into criminal behavior that was not a chosen kind of behavior; it did not demonstrate that his ability to engage in "deliberate" conduct in the course of a particular crime was diminished. As in Franklin, "[t]his is not surprising," 101 L.Ed.2d at 174 (concurring opinion), because the evidence of Selvage's addiction did not encompass the effects of the particular drugs he took on the deliberateness of

Mr. Selvage's status as the person who fired the fatal shot was plainly relevant to special issue one. However, upon hearing the instruction concerning special issue one and the argument by defense counsel and the prosecutor about the scope of this issue, see pages 12-15, supra, the jury could reasonably have believed that even if Mr. Selvage did not actually kill Deputy Garza, this factor could not influence their consideration of special issue one.

The jurors were instructed without any elaboration by the court to decide "whether the conduct of ... John Henry Selvage, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the

---

his conduct. Rather, it focused entirely upon his compulsive, unrelenting need to satisfy his addiction. Thus, it had no relevance to "deliberateness" and was relevant to "future dangerousness" only as an aggravating factor.

death of the deceased or another would result." JA 4. The arguments of defense counsel and the prosecutor, however, taught the jury that the phrase "conduct ... that caused the death of the deceased" had a broader meaning than the conduct that actually killed Deputy Garza. Counsel for both sides explained that the law allowed the jury to answer this question "yes" even if they believed that Mr. Selvage was not the actual killer. R. 2951 (defense counsel); 2968-71, 2972, 2973 (prosecutor). In light of this explanation, a reasonable juror could have understood the reference to Mr. Selvage's "conduct ... that caused the death of the deceased" as referring not only to any evidence that he actually killed Deputy Garza but also, more generally, to the evidence of his participation in the crime

during which Deputy Garza was killed.[40] With such an understanding of this phrase, a reasonable juror could then have believed that special issue one focused on whether Mr. Selvage's conduct that was established beyond a reasonable doubt--

[40] Not only would this understanding have been reasonable in the context of Mr. Selvage's trial, it would also have been consistent with the Texas Court of Criminal Appeals' construction of special issue one in Selvage's case. On appeal, Selvage argued that there was no evidence that he actually killed Deputy Garza and thus the "yes" answer to special issue one could not stand. Selvage v. State, 680 S.W.2d at 21-22. The Court rejected this argument:

> [A]though there is no direct evidence that appellant shot the deceased, the evidence was sufficient to show that his conduct was committed deliberately and with reasonable expectation that death would result. Unlike Enmund [in Enmund v. Florida, 458 U.S. 782 (1982)], appellant used lethal force to effectuate a safe escape and attempted to kill Ventura and Roberts as they pursued him and his companion from the jewelry store. Appellant's actions indicate a reasonable expectation that the death of the deceased or another would result.

Id. at 22. Plainly the Court of Criminal Appeals also construed "conduct ... that caused the death of the deceased" more broadly than "actual homicidal conduct."

his engaging in an armed robbery which he helped plan and his firing a gun at people other than Officer Garza during the course of the robbery -- was "committed deliberately and with the reasonable expectation that the death of the deceased ... would result." Jurors who understood the instruction in this fashion would have excluded their finding that Mr. Selvage was not the actual killer from their deliberations concerning special issue one.[41]

For these reasons, Mr. Selvage's status as the actual killer of Deputy Garza, like Johnny Penry's mental retardation in Penry v. Lynaugh, "was relevant to the question [asked in special

---

[41] Such jurors would thus have disregarded defense counsel's plea, based on this factor, to answer special issue one "no." They would have perceived counsel's plea to their "conscience" as a plea to disregard the task required of them in answering special issue one.

issue one], but it also 'had relevance to [his] moral culpability beyond the scope of the special verdict questio[n].'" 106 L.Ed.2d at 280 (quoting Franklin v. Lynaugh, 101 L.Ed.2d 155, 173 (1988) (concurring opinion)). It was relevant to issue one if Selvage was the actual killer, for such status would tend to show that he caused the death of the deceased deliberately and with the reasonable expectation that death would result. If, however, the evidence tended to show that Selvage was not the actual killer (or failed to establish that he was), it would no longer be relevant to special issue one. Such a showing would nevertheless be highly relevant to Selvage's moral culpability, for the fact that someone participates in a felony murder as an accomplice or joint perpetrator but does not personally commit the murder is

manifestly a mitigating factor. See State v. Sonnier, 402 So.2d 650, 656 (La. 1981); Harmon v. State, 527 So.2d 182, 189 (Fla. 1989); Downs v. Dugger, 514 So.2d 1069, 1072 (Fla. 1987). See also Lockett v. Ohio, 438 U.S. at 608 (sentencer must be allowed to give independent mitigating weight to "defendant's comparatively minor role in the offense").

The jury instructions, as reasonable jurors could have understood them, thus did not allow the jury to consider doubt about Mr. Selvage's status as the triggerman as a mitigating factor. There were no supplemental or explanatory instructions given which would have assured the jury's consideration of this factor as a mitigating circumstance.[42] As

---

42 Counsel for Mr. Selvage did request an instruction which would have allowed for this, see JA 4, but his request was denied. R. 2938.

the Court explained when faced with the same situation in Penry,

> In the absence of jury instructions defining [special issue one] in a way that would clearly direct the jury to consider fully [Selvage's] mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of [doubt about Selvage's status as the triggerman] in answering the first special issue.

106 L.Ed.2d at 281.

ii. The Penry Error Deprived Mr. Selvage of the "Basic Trial Process" Guaranteed to A Capital Defendant

The most fundamental and settled component of due process is the right to be heard in one's defense. "The theme that 'due process of law signifies a right to be heard in one's defence,' ... has continually recurred" for more than a century in the Court's jurisprudence. Boddie v. Connecticut, 401 U.S. 371, 377 & n.3 (1971) (citing cases) (quoting Hovey

v. Elliott, 167 U.S. 409, 417 (1897)). Denial of the right to be heard is such a fundamental error that it has been considered a denial of the "basic trial process" since at least the time of Hovey, where the Court held that "[a] sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." 167 U.S. at 414. The Penry error in Mr. Selvage's case deprived him of this most fundamental right.

The right to be heard in one's defense in a capital sentencing proceeding is the right to be heard as to why the death sentence should not be imposed. The exercise of this right is necessary to "ensure the reliability, under Eighth Amendment standards, of the determination

that 'death is the appropriate punishment in a specific case.'" Lockett v. Ohio, 438 U.S. at 601 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). A procedure which cuts off the right to be heard, "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S. at 605. The right of the capital defendant to be heard is also necessary for "a system of capital punishment ... [to be] humane and sensible to the uniqueness of the individual." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). The "fundamental respect for humanity underlying the Eighth Amendment," Woodson v. North Carolina, 428 U.S. at 304, cannot countenance a process of capital sentencing which "treats all persons convicted of a designated offense not as uniquely individual human beings,

but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Id. Accordingly, the denial of the defendant's right to be heard as to why the death sentence should not be imposed both "undermine[s] the fundamental fairness that must underlie a [death sentence] [and] seriously diminish[es] the likelihood of obtaining an accurate [determination that death is the proper sentence in a particular case]." Teague v. Lane 103 L.Ed.2d at 359.

The Penry error in Mr. Selvage's case deprived him of the right to be heard because it prevented the jury from giving effect to the reasons he proffered in support of a life sentence. A capital defendant's right to be heard is not honored simply by allowing him to present mitigating evidence and argument, for

"Lockett requires the sentencer to listen." Eddings v. Oklahoma, 455 U.S. at 115 n.10. As the Court explained in Penry, "Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to give effect to that evidence in imposing sentence." 106 L.Ed.2d at 278. The sentencing procedure in Mr. Selvage's case prevented the jury from considering, i.e., giving effect to, his mitigating evidence as surely as if the jury had been explicitly directed not to consider that evidence.[43]

Accordingly, the Penry violation in Mr. Selvage's case had the effect of "abort[ing] the basic trial process."

---

[43] See Rose v. Clark, 478 U.S. at 580 n.8 (condemning as fundamentally unfair, and never harmless, "'instructional errors that prevent a jury from considering an issue'") (quoting Connecticut v. Johnson, 460 U.S. 73, 95 n.3 (1983) (Powell, J., dissenting)).

Rose v. Clark, 478 U.S. at 578 n.6. It prevented the sentencer from engaging in the decisional process which is fundamental to the judgment required of capital sentencers by the Constitution.[44]

iii. The Penry Error in Mr. Selvage Case Precluded the Jury's Consideration of the Most Compelling Mitigating Circumstances That Can Be Proffered

---

[44] In light of this analysis, the Court can readily distinguish the constitutional error presented in Dugger v. Adams, 103 L.Ed.2d 435 (1989), from the error presented here. The error presented in Adams was the error considered in Caldwell v. Mississippi, 472 U.S. 320 (1985): instructions by the trial judge and argument by the prosecutor diminished the jury's sense of responsibility for its sentencing decision. While this error plainly raised a question about the accuracy of the jury's sentencing recommendation, 103 L.Ed.2d at 446 n.6, it did not present an error which interfered with the "basic trial process" described in Rose v. Clark: it did not compromise the impartiality of the jury or judge, it did not deprive Adams of counsel, it did not interfere with Adams' presentation of evidence and argument, and it did not — as the error did here — prevent the jury from considering issues which it constitutionally had to consider in order to recommend a sentence. Accordingly, the Court's adoption of the definition of "fundamental miscarriage of justice" urged by Mr. Selvage would in no way be inconsistent with its holding in Adams.

The Penry error in Mr. Selvage's case did not just deprive him of the sentencer's consideration of "ordinary" aspects of his character, background, or crime. "Ordinary" mitigating circumstances -- "a turbulent family history," Eddings v. Oklahoma, 455 U.S. at 115; growing up in a poor family, Hitchcock v. Dugger, 481 U.S. at 397; receiving "[in]sufficient guidance and discipline" as a child, South Carolina v. Gathers, 104 L.Ed. 2d 876, 887 (1989) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting); being a "well-behaved and well-adjusted prisoner," Skipper v. South Carolina, 476 U.S. 1, 4 (1986); or being "an affectionate and caring person," South Carolina v. Gathers, supra; Hitchcock v. Dugger, supra -- are plainly "'mitigating' in the sense that they might

serve 'as a basis for a sentence less than death.'" Skipper v. South Carolina, 476 U.S. at 4-5 (quoting Lockett v. Ohio, 438 U.S. at 604). The mitigating circumstances in Mr. Selvage's case, however, were qualitatively different from these.

The Court has recognized that severe mental illness can be so disabling that "the Eighth Amendment prohibits a State from carrying out a sentence of death...." Ford v. Wainwright, 477 U.S. 399, 409-410 (1986) (plurality opinion). Mental illness short of that which would preclude the execution of a death sentence thus weighs heavily in favor of a life sentence. Such evidence "tend[s] to diminish the defendant's responsibility for his acts," making him "'deserving [of] less punishment....'" Skipper v. South Carolina, 476 U.S. at 12 (Powell, J.,

joined by Burger, C.J., and Rehnquist, J., concurring). Accord California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

Similarly, the Court has recognized that a defendant like Mr. Selvage, who neither kills nor encourages another to kill, is less morally culpable than an actual killer. As the concurring justices explained in Skipper v. South Carolina,

> Such evidence obviously [bears] strongly on the degree to which the defendant [is] morally responsible for h[is] crime; indeed, we have held that similar evidence precludes application of the death penalty for precisely this reason. Enmund v. Florida, 458 U.S. 782, 798-801 (1982).

476 U.S. at 12. While Tison v. Arizona, 481 U.S. 137 (1987), has made clear that the death penalty is an available punishment for a person like Mr. Selvage, Tison does not diminish the importance of

one's not being the killer in assessing moral culpability.

Because the two mitigating circumstances which were removed from the jury's consideration in Mr. Selvage's case were the kind of circumstances which, under slightly different conditions, would have precluded the imposition of a death sentence altogether, they would have weighed very heavily in favor of a life sentence. The harm to Mr. Selvage from the jury's inability to consider and give effect to these circumstances is, therefore, qualitatively and quantitatively greater than in a case involving any other kind of mitigating circumstance.

iv. The Penry Violation in Mr. Selvage's Case Probably Resulted in the Imposition of the Death Sentence on One Who Is Actually Undeserving of It

Although a condemned person should

not be required to show that he is "actually undeserving of the death sentence" in order to demonstrate that a Penry error has led to a fundamental miscarriage of justice in his case, Mr. Selvage can make such a showing if all the evidence bearing on this question is taken into account.

When the purpose of the miscarriage of justice inquiry is to determine whether the condemned prisoner actually deserves the death sentence, the inquiry must look to the factual bedrock of the sentencing question. All probative evidence, whether or not it was admitted at trial, must be taken into account. A plurality of the Court in Kuhlmann v. Wilson, 477 U.S. 436 (1986), recognized the need to do this in discussing the parallel question under 28 U.S.C. § 2244(b), whether the "ends of justice" require reconsideration in a

successive petition of a claim previously decided. The Court explained that the question of whether the prisoner has made "a colorable showing of factual innocence," 477 U.S. at 454, "must be determined by reference to all probative evidence of guilt or innocence." Id. at 454 n.17 (emphasis in original). Such an inquiry faithfully reflects the central historic purpose of the writ of habeas corpus: "the substance of 'justice,' not the form of procedures." Murray v. Carrier, 477 U.S. at 500 (Stevens, joined by Blackmun, JJ., concurring in judgment). To carry out this mission, "habeas corpus cuts through all forms and goes to the very tissue of the structure." Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

When all of the probative evidence in Mr. Selvage's case, is examined, see

pages 17-31, supra, it provides compelling support for the compassionate view of the crime and of Mr. Selvage which began to emerge at trial. The mitigating circumstances -- the doubt about whether Mr. Selvage shot Deputy Garza and the drug-based impairment of Mr. Selvage's ability to think and act appropriately which led him to commit the crimes he committed -- remain, but they are far more powerful than the evidence at trial suggested. Understood in light of all the probative evidence, the mitigating circumstances weigh very heavily in favor of a life sentence, for the real story of this case is a story of human frailty, not evil.

John Selvage was a young man whose life once held much promise. His family loved him, provided for his needs, and nurtured and stimulated him for the first

eighteen years of his life. The promise turned to despair, however, after Selvage spent two years in the military. He became addicted to drugs, which ate away his potential for a bright future and destroyed his youthful capacity for growth and creativity. He became further compromised by mental illness: the world which before had been encouraging and enlightening became threatening and bewildering. Driven toward people like Wilbur Kelly, who could help him feed his addiction through the fruits of crime, Selvage participated in two robberies, one at the Stop-and-Go market, and one four days later at Ventura's Jewelry. In each, Kelly was the aggressor, the triggerperson, the probable killer. Selvage was driven to these crimes by the gnawing agony of drug addiction and by the fear of what he perceived as an

increasingly threatening and hostile environment, not by greed or callousness or meanness of spirit.

In short, John Selvage probably killed no one, and his non-lethal participation in two felony-murders was a product of disability rather than purposeful conduct. There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to ... emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. at 545 (O'Connor, J., concurring). To sustain Mr. Selvage's death sentence in light of all the probative evidence would dishonor this foundational societal belief. It would treat "conduct that actually should militate in favor of a lesser penalty [than death], such as perhaps the

defendant's mental illness," Zant v. Stephens, 462 U.S. 862, 885 (1983), as an aggravating circumstance.

John Selvage is, accordingly, factually undeserving of death. Had the jury which sentenced him heard all the probative evidence and been allowed to give full effect to its consideration of the evidence, it probably would not have sentenced him to death. The refusal of the federal habeas courts to reach the merits of Mr. Selvage's Penry claim has, therefore, resulted in a fundamental miscarriage of justice.

CONCLUSION

For these reasons, petitioner respectfully requests that the Court vacate the judgment and opinion of the Court of Appeals and remand his case, with instructions that the District Court grant the writ of habeas corpus, or in the

alternative, hold an evidentiary hearing to determine whether on the basis of all the probative evidence, Mr. Selvage deserves the death sentence.

Respectfully submitted,

JULIUS L. CHAMBERS
*RICHARD H. BURR, III
GEORGE H. KENDALL
STEVEN W. HAWKINS
99 Hudson Street, 16th Fl.
New York, New York 10013
(212) 219-1900

DAVID CUNNINGHAM
1927 Norfolk
Houston, Texas 77098
(713) 520-7701

Counsel for Petitioner

*Counsel of Record

APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES OF THE STATE OF TEXAS

Tex. Code Crim. Proc. Ann. art 37.071 (Vernon 1981):

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or

against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would con-stitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

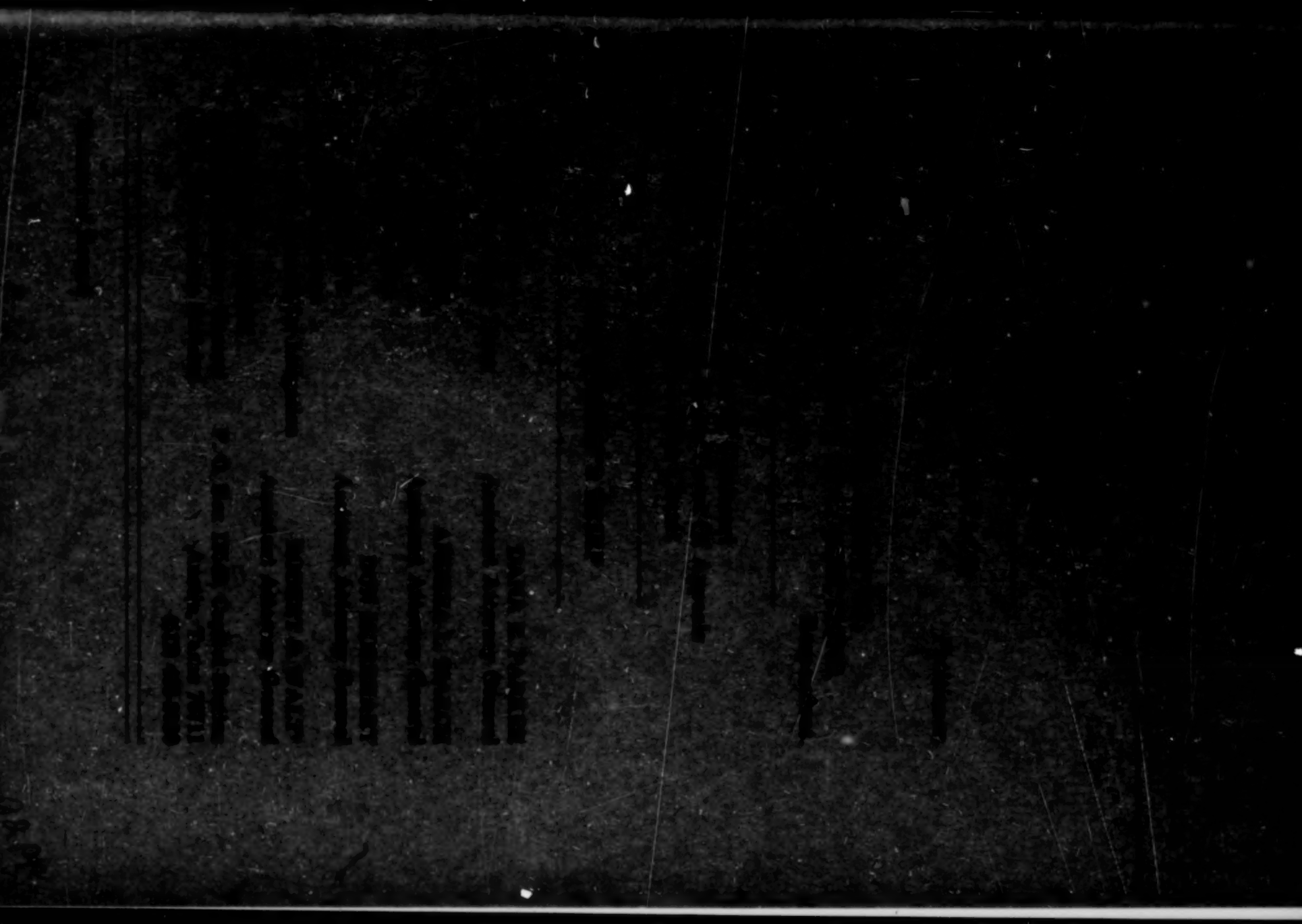
(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by

the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.



QUESTION PRESENTED

At the time petitioner was tried, was there "cause" for not raising a claim based upon arguments later accepted in *Penry v. Lynaugh*, 106 L.Ed.2d 256 (1989); and if not, would the application of a procedural bar to this claim result in a "'fundamental miscarriage of justice,'" *Smith v. Murray*, 477 U.S. 527 (1986)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Course of Proceedings and Disposition Below 3

B. Statement of Facts 5

1. Facts adduced at guilt-innocence phase of trial 5

2. Facts adduced at punishment phase of trial 8

3. Facts adduced in state habeas corpus proceedings 11

SUMMARY OF ARGUMENT 16

ARGUMENT 20

I. SELVAGE'S CLAIMS THAT PROCEDURAL DEFAULT IS NOT REGULARLY APPLIED IN TEXAS AND THAT THE PROCEDURAL BAR IS NOT AN INDEPENDENT STATE GROUND EXCEED THE QUESTION UPON WHICH CERTIORARI WAS GRANTED AND, THUS, ARE NOT PROPERLY BEFORE THE COURT; ALTERNATIVELY, TEXAS COURTS DO ROUTINELY AND REGULARLY APPLY PROCEDURAL BARS TO REVIEW OF *PENRY* CLAIMS AND TEXAS' PROCEDURAL REQUIREMENT IS AN INDEPENDENT STATE GROUND 20

A. The Court should not address arguments which exceed the scope of the question presented and which were neither presented to nor considered *sua sponte* by the courts below 20

B. Texas courts have consistently and regularly imposed a procedural bar to foreclose review of claims alleging erroneous jury instructions during capital sentencing proceedings 23

C. The state courts' contemporaneous objection rule is an "independent" state ground 27

II. *JUREK V. TEXAS, WOODSON V. NORTH CAROLINA AND LOCKETT V. OHIO* PREDATED SELVAGE'S TRIAL, OTHER COUNSEL PERCEIVED THE CONSTITUTIONAL CLAIM PRIOR TO HIS TRIAL AND SELVAGE'S COUNSEL ACKNOWLEDGED HE KNEW OF THE BASIS FOR THE CLAIM. THEREFORE, SELVAGE'S *PENRY* CLAIM WAS NOT NOVEL AT THE TIME OF TRIAL AND SELVAGE CANNOT ESTABLISH CAUSE FOR HIS PROCEDURAL DEFAULT 35

A. The Court should adhere to its consistent past pronouncements that futility will not constitute cause for a procedural default 35

1. The meaning of "availability" in light of *Reed v. Ross* and *Engle v. Isaac* 38

2. The legal basis for Selvage's claim was available at the time of the default 40

B. The policies which give rise to the procedural default doctrine will be undermined if counsel's "reasonable" perception of futility is sufficient to constitute cause for a procedural default 44

1. Institutional or systemic considerations are furthered by rejecting the concept of futility as cause 44

a. Evolution of the law 44

b. Adversary system 46

c. Comity 47

d. Finality 49

III. SELVAGE'S PROCEDURAL DEFAULT IS NOT EXCUSED BECAUSE THE LACK OF SPECIAL INSTRUCTIONS IN SELVAGE'S CASE DID NOT RESULT IN A DEATH SENTENCE IMPOSED ON A PERSON WHO IS "ACTUALLY INNOCENT" OF SUCH A SENTENCE 50

A. Selvage's proposal that a "fundamental miscarriage of justice" should be unrelated to his actual innocence is foreclosed by well established precedent of this Court and, if adopted, would eviscerate the procedural default doctrine 51

B. Because Selvage does not demonstrate the existence at the time of trial of mitigating evidence so compelling that no rational juror could have concluded that a death sentence was appropriate, he fails to demonstrate actual innocence of the death sentence sufficient to excuse his procedural default 58

CONCLUSION 64

TABLE OF AUTHORITIES

Cases **Page**

Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), *rev'd on other grounds sub nom. Adams v. Texas*, ___ U.S. ___ (1980) 25,26,43

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) . . . 21

Ake v. Oklahoma, 470 U.S. 68 (1985) 29

Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984) 29,31

Barefoot v. Estelle, 463 U.S. 880 (1983) 59

Barnette v. State, 709 S.W.2d 650 (Tex. Crim. App. 1986) 33

Batson v. Kentucky, 476 U.S. 79 (1986) 34

Bell v. Lynaugh, 858 F.2d 978 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3262, *reh'g denied*, ___ U.S. ___, 110 S.Ct. 223 (1989) 24

Berkemer v. McCarty, 468 U.S. 420 (1984) 21,22

Boles v. State, 598 S.W.2d 174 (Tex. Crim. App. 1980) 32

Brady v. Maryland, 373 U.S. 83 (1963) 52,53,57

Bridge v. Lynaugh, 856 F.2d 712, *on reh'g*, 863 F.2d 370 (5th Cir.), *stay granted*, ___ U.S. ___, 109 S.Ct. 20 (1983) 24

Burns v. State, 761 S.W.2d 353 (Tex. Crim. App. 1988) 56

Caldwell v. Mississippi, 472 U.S. 320 (1985) 54

Carlson v. Green, 446 U.S. 14 (1980) 21,22

City of Springfield, Mass. v. Kibbe, 480 U.S. 257 (1987) 22

Crawford v. State, 617 S.W.2d 925 (Tex. Crim. App. 1980) 34

Darland v. State 582 S.W.2d 452 (Tex. Crim. App. 1979) 34

Desist v. United States, 394 U.S. 244 (1969) 48

Duffy v. State, 567 S.W.2d 197 (Tex. Crim. App. 1978) 23

Dugger v. Adams, ___ U.S. ___, 109 S.Ct. 1211 (1989) . . . . . *passim*

Dunlap v. State, 477 S.W.2d 605 (Tex. Crim. App. 1971) 34

Engle v. Isaac, 456 U.S. 107 (1982) . . . . . *passim*

Enmund v. Florida, 458 U.S. 782 (1982) 59,60

Estelle v. Smith, 451 U.S. 454 (1981) 53

Evans v. State, 601 S.W.2d 943 (Tex. Crim. App. 1980) 33

Ex parte Bagley, 599 S.W.2d 332 (Tex. Crim. App. 1974) 34

Ex parte Barnard, Application No. 14,264-04 (Tex. Crim. App. January 6, 1989) 24

Ex parte Briddle, Application No. 20,103-01 (Tex. Crim. App. April 14, 1989) 24

Ex parte Chambers, 688 S.W.2d 483 (Tex. Crim. App. 1984), *cert. denied sub nom. Texas v. Chambers*, 474 U.S. 864 (1985) 28

Ex parte Drew, Application No. 13,998 (Tex. Crim. App. June 14, 1988) 24

Ex parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978) 44

Ex parte Harris, Application No. 17,919-01 (Tex. Crim. App. August 19, 1988) 24

Ex parte Johnson, Application No. 15,840-02 (Tex. Crim. App. Ocotober 19, 1987) 24

Ex parte Macias, Application No. 17,991-03 (Tex. Crim. App. October 25, 1988) 24

Ex parte Marquez, Application No. 17,898-01 (Tex. Crim App. January 4, 1988) 24

Ex parte Paster, Application No. 15,995-02 (Tex. Crim. App. September 19, 1989) 24

Ex parte Rougeau, Application No. 19,419-01 (Tex. Crim. App. March 7, 1989) 24

Ex parte Woods, Application No. 10,855-02 (Tex. Crim. App. July 7, 1989) 24

Fierro v. Lynaugh, 879 F.2d 1276 (5th Cir. 1989) . . . 24

Fierro v. State, 706 S.W.2d 310 (Tex. Crim. App. 1986), ... 23

Franklin v. Lynaugh, 487 U.S. ___, 108 S.Ct. 2320 (1988) 47,57

Francis v. Henderson, 425 U.S. 526 (1976) 51

Furman v. Georgia, 408 U.S. 238 (1972) 40

Garcia v. State, 605 S.W.2d 565 (Tex. Crim. App. 1980) 32

Grady v. State, 614 S.W.2d 830 (Tex. Crim. App. 1981) 31

Gregg v. Georgia, 428 U.S. 153 (1976) 43

Griffith v. Kentucky, ___ U.S. ___, 107 S.Ct. 708 (1987) 37,44

Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038 (1989) 36

Henderson v. Kibbe, 431 U.S. 145 (1977) 52

Jackson v. Denno, 378 U.S. 368 (1964) 56

Jackson v. Virginia, 443 U.S. 307 (1979) 62

Johnson v. State, 629 S.W.2d 731 (Tex. Crim. App. 1981) 23,32,33

Jurek v. Texas, 428 U.S. 262 (1976) 41,43,58

King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1088 (1978) 44

King v. Lynaugh, 828 F.2d 257 (5th Cir. 1987), *rev'd*, 850 F.2d 1055 (5th Cir. 1988)(en banc), *cert. denied*, ___ U.S. ___, 109 S.Ct. 820 (1989) . .5,24

Landry v. Lynaugh, 844 F.2d 1117 (5th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 248 (1988) 24

Leland v. Oregon, 343 U.S. 790 (1952) 39,40

Little v. State, 758 S.W.2d 551 (Tex. Crim. App. 1988) 34

Lockett v. Ohio, 438 U.S. 586 (1978) 37,42,43,57

Lowenfield v. Phelps, ___ U.S. ___, 108 S.Ct. 546 (1988) 47

Lugo v. State, 667 S.W.2d 144 (Tex. Crim. App. 1981) 32

Martinez v. State, 448 S.W.2d 488 (Tex. Crim. App. 1970) 32

Mathews v. State, 768 S.W.2d 731 (Tex. Crim. App. 1989) 34

McCoy v. Lynaugh, 874 F.2d 954 (5th Cir.), *stay denied*, ___ U.S. ___, 109 S.Ct. 2114 (1989) 24

Mendoza v. State, 552 S.W.2d 444 (Tex. Crim. App. 1977) 34

Motley v. State, 773 S.W.2d 283 (Tex. Crim. App. 1989) 25

Mullaney v. Wilbur, 421 U.S. 684 (1975) 39,42

Murray v. Carrier, 477 U.S. 478 (1986) . . . . . *passim*

Patterson v. New York, 432 U.S. 192 (1977) 62

Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934 (1989) . . . . . *passim*

Perez v. State, 495 S.W.2d 242 (Tex. Crim. App. 1973) 32

Perillo v. State, 758 S.W.2d 567 (Tex. Crim. App. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3263 (1989) 23

Pyles v. State, 755 S.W.2d 98 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 543 (1986) . . . 23

Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App.), *cert. denied*, 449 U.S. 893 (1980) 43

Reed v. Ross, 468 U.S. 1 (1984) 36,37,38,41

Rogers v. State, 640 S.W.2d 248 (Tex. Crim. App. 1982) 34

Rose v. Clark, 478 U.S. 570 (1986) 55,57

Russell v. State, 665 S.W.2d 771 (Tex. Crim. App. 1983) 34

Satterwhite v. Texas, ___ U.S. ___, 108 S.Ct. 1792 (1988) 57

Skipper v. South Carolina, 476 U.S. 1 (1986) 59

Smith v. Murray, 477 U.S. 527 (1986) . . . . . *passim*

Smith v. Phillips, 455 U.S. 209 (1982) 28,32

Stanford v. Kentucky, ___ U.S. ___, 109 S.Ct. 2969 (1989) 59

State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976) 42

Streetman v. Lynaugh, 835 F.2d 1519 (5th Cir.), *stay denied*, ___ U.S. ___, 109 S.Ct. 588 (1988) . . . 24

Strickland v. Washington, 466 U.S. 668 (1984) . . .61,62

Thompson v. Lynaugh, 821 F.2d 1054 (5th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 5 (1987) 24

Thompson v. Oklahoma, ___ U.S. ___, 108 S.Ct. 2687 (1988) 60

Thompson v. State, 537 S.W.2d 732 (Tex. Crim. App. 1976) 34

Tison v. Arizona, 481 U.S. ___, 107 S.Ct. 1676 (1987) 58,60

United States v. Frady, 456 U.S. 152 (1982) 51,52

United States v. Johnson, 457 U.S. 537 (1982) 37

Wainwright v. Sykes, 433 U.S. 72 (1977) . . . . . .*passim*

White v. State, 495 S.W.2d 903 (Tex. Crim. App. 1973) 32

White v. State, 610 S.W.2d 504 (Tex. Crim. App. 1981) 31

Wilkerson v. State, 726 S.W.2d 542 (Tex. Crim. App. 1986) 25,27

Williams v. Lynaugh, 837 F.2d 1294 (5th Cir. 1988) 24

Williams v. State, 622 S.W.2d 116 (Tex. Crim. App. 1981), *cert. denied*, 455 U.S. 1008 (1982) 24

Williams v. State, 674 S.W.2d 315 (Tex. Crim. App. 1984) 25,26

Winship, In re, 397 U.S. 358 (1970) 39,41

Woodson v. North Carolina, 428 U.S. 280 (1976) . .41,43

Constitutions, Statutes and Rules Page

U.S. Const., art. III § 2 44

U.S. Const., Amend. VIII . . . . . *passim*

U.S. Const., Amend. XIV 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 3

Tex. Code Crim. Proc. Ann. art. 36.14 (Vernon Supp. 1989) 2,23,30,56

Tex. Code Crim. Proc. Ann. art. 36.15 (Vernon Supp. 1989) 2,23,30,56

Tex. Code Crim. Proc. Ann. art. 36.19 (Vernon Supp. 1989) 2,23,31,32

Tex. Code Crim. Proc. Ann. art. 37.071(Vernon Supp. 1989) 3,26,33

Tex. Penal Code Ann. § 19.03(a)(1) and (2) (Vernon Supp. 1989) 3

Sup. Ct. R. 21.1(a) 23

Tex. R. App. P. 52 56

Other Authorities

Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) 56,63

NO. 87-6700

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

JOHN HENRY SELVAGE,
Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent herein,[1] by and through his attorney, the Attorney General of Texas, and files this Brief.

---

[1] For clarity, Respondent is referred to herein as "the state" and Petitioner as "Selvage."

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is included in the Joint Appendix, hereinafter "J.A.," at pages 68-82. *Selvage v. Lynaugh*, 842 F.2d 89 (5th Cir. 1988). The opinion of the United States District Court for the Southern District of Texas, which is not published, is included in the Joint Appendix (J.A. 63-67). The Order of the Texas Court of Criminal Appeals denying state habeas corpus relief to Selvage, which is not published, is included in the Joint Appendix (J.A. 38-39). The Findings of Fact, Conclusions of Law and Order of the 230th Judicial District Court of Harris County, Texas, recommending denial of Selvage's state habeas corpus application is included in the Joint Appendix (J.A. 29-37). The opinion of the Texas Court of Criminal Appeals affirming Selvage's conviction and sentence is reported at 680 S.W.2d 17 (Tex. Crim. App. 1984).

JURISDICTION

Selvage invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Selvage bases his claims on the Eighth and Fourteenth Amendments to the United States Constitution, which are set out in the Appendix to his brief. Also involved are Article 37.071 of the Texas Code of Criminal Procedure, which is likewise set out in the Appendix to his brief, and Articles 36.14, 36.15, 36.16 and 36.19 of the Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On December 4, 1979, Selvage was indicted for the capital murder of Albert Garza, the indictment alleging that Selvage murdered the deceased while robbing and attempting to rob Stephen Ventura or, alternatively, that the deceased was a peace officer known by Selvage to be acting in the lawful discharge of an official duty. *See* Tex. Penal Code Ann. § 19.03 (a)(1) and (2) (Vernon Supp. 1989). Upon his plea of not guilty, Selvage was tried before a jury, which on February 4, 1980, found him guilty of the capital offense. After a punishment hearing, the jury on February 11, 1980, affirmatively answered the two special issues submitted to it pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1989). Accordingly, punishment was assessed at death. This conviction and sentence were affirmed by the Texas Court of Criminal Appeals on July 11, 1984, with rehearing denied on October 10, 1984. *Selvage v. State*, 680 S.W.2d 17 (Tex. Crim. App. 1984). Certiorari review was not sought.

Rather than seek state collateral review, Selvage filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 and a request for stay of execution in the United States District Court for the Southern District of Texas, Houston Division, and that Court granted a stay of execution on November 8, 1985. The district court subsequently denied habeas corpus relief. *Selvage v. Lynaugh*, No. H-85-6253 (S.D.Tex. March 4, 1986).[2] The district court's judgment was affirmed by

---

[2]The district court had earlier denied habeas relief on January 26, 1986, but, upon Selvage's failure to timely appeal,

(Footnote continued on next page)

the United States Court of Appeals for the Fifth Circuit on July 23, 1987, *Selvage v. Lynaugh*, 823 F.2d 845 (5th Cir. 1987), and this Court denied a petition for writ of certiorari on November 2, 1987. *Selvage v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 309 (1987).

On December 10, 1987, the state convicting court scheduled Selvage's execution for January 27, 1988, and, upon Selvage's filing his second state habeas application, modified the execution date to March 30, 1988. On March 14, 1988, the trial court entered factual findings and legal conclusions, recommended that habeas relief be denied and forwarded the writ to the Court of Criminal Appeals (J.A. 29-37), which adopted the trial court's findings and denied habeas relief (J.A. 38-39). *Ex parte Selvage*, No. 16,884-02 (Tex. Crim. App. March 21, 1988).

Simultaneous with the filing of his second state writ application, Selvage filed his second petition for writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston Division, on January 21, 1988. After state remedies were exhausted, the district court entered an order denying relief on four grounds, including the issue now before this Court. However, the district court granted a stay of execution on Selvage's Eighth Amendment claim asserting a right to question prospective jurors on parole considerations in light of a panel decision of

(Footnote continued from previous page)
vacated this judgment on Selvage's motion pursuant to Fed. R. Civ. P. 60(b) and reinstated the judgment on March 4, 1986. While his Rule 60(b) motion was pending, Selvage filed a state writ of habeas corpus pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon Supp. 1989), which was denied by the Texas Court of Criminal Appeals. *Ex parte Selvage*, No. 16,884-01 (Tex. Crim. App. March 6, 1987).

the Fifth Circuit holding such a right to exist. *See King v. Lynaugh*, 828 F.2d 257 (5th Cir. 1987), *rev'd*, 850 F.2d 1055 (5th Cir. 1988) (en banc), *cert. denied*, ___ U.S. ___, 109 S.Ct. 820 (1989). *Selvage v. Lynaugh*, No. H-88-166 (S.D.Tex. March 25, 1988). The state appealed the granting of the stay, and Selvage appealed the district court's denial of relief on the four claims, seeking a stay of execution pending the appeal. On March 28, 1989, the United States Court of Appeals for the Fifth Circuit vacated the stay of execution and denied Selvage's request for stay pending appeal. *Selvage v. Lynaugh*, 842 F.2d 89 (5th Cir. 1988). This Court granted a stay of execution on the same date. *Selvage v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 1283 (1988), and granted certiorari on October 10, 1989. *Selvage v. Lynaugh*, ___ U.S. ___, 110 S.Ct. 231 (1989).

B. Statement of Facts

1. Facts adduced at guilt-innocence phase of trial

On July 30, 1979, Steven Ventura and two employees, Charlye Jo Ivy and Ken Roberts, were working at the jewelry store Ventura owned in Houston, Texas (R VI 2287, 2293, 2379).[3] The deceased, Albert Garza, a deputy sheriff with the Harris County Sheriff's Department and long-time friend of Ventura, arrived at the store in the late afternoon to visit with Ventura (R VI 2295; 2379, VII 2610). After making several telephone calls, Garza conversed with Ventura, Ivy and Roberts (R VI 2295). Shortly thereafter, a black female, later identified as

[3]"R" refers to the appellate record of Selvage's 1980 trial, consisting of pleadings filed in the trial court and a transcript of the trial, with reference to the volume and the page number located at the bottom left corner of each page.

Brenda Joseph, entered the store and asked Ivy to help her select a birthday present fo her daughter (R VI 2381). Ivy soon became suspicious because the woman could not remember her daughter's birthday (R VI 2382). A few minutes later, Selvage, carrying a brown cloth bag or satchel, and Wilbur Kelly, carrying a dark or blue cloth bag, entered the store (R VI 2296, 2302-03).

While in the store's back office, Ventura, who had seen Kelly and Selvage in the store the previous day and knew that they were not regular customers, became suspicious and informed Garza of his suspicion (R VI 2296-97, 2365-67). Kelly then asked Ventura to see wedding rings while Selvage inquired of a "big diamond" he had previously seen (R VI 2297, 2302; VII 2415-16). After both men repeated their questions, Ventura looked in Garza's direction to indicate his nervousness (R VI 2297). Garza then left the back office, removed his coat, conspicuously displayed his badge and gun, and offered to assist Selvage, thereby separating Kelly and Selvage (R VI 2298-99, 2302).

Ventura then went to the area where Garza and Selvage were to get a layaway ticket (R VI 2304). At that time he observed Selvage in front of Garza and Kelly slightly behind Selvage (R VI 2305). As Ventura leaned over to obtain a layaway ticket, he heard a shot (R VI 2304). Garza fell into Ventura, who ran into the office, where he heard other shots (R VI 2306-07). Obtaining a pistol, Ventura fired at Selvage, whom he observed taking jewelry from a broken showcase (R VI 2307). Selvage leaped to the side, and Ventura heard another shot, which he believed came from Selvage's gun. Ventura fired a second time, and shots were

exchanged (R VI 2307).[4] The two men then ran, with Ventura chasing them, and, in a parking lot around the corner from the store, the two males turned and began shooting at him (R VI 2308-10). Ventura returned fire with two pistols and a shotgun (R VI 2310-12). Selvage and Kelly then got into their car, and Selvage leaned over the top of the car on the passenger side, shooting back at Ventura (R VI 2311; VII 2455, 2462). After Selvage and Kelly fled, Ventura returned to the store to find Garza lying on the floor bleeding from the mouth (R VI 2314); Garza died of a gunshot wound to the neck (R VI 2314; VII 2727-29).

Carl Marlborough, an acquaintance of Selvage and Wilbur Kelly, testified that Kelly and Selvage tried to enlist him for the robbery and that Selvage helped Kelly plan it (R VII 2428-29, 2432-33, 2435).[5] Marlborough procured a pistol, identified as State's Exhibit 66, for Kelly and Selvage (R VII 2688). During the offense, Selvage was carrying a brown bag (R VI 2303). According to Marlborough, the pistol was given back to him by Kelly, but Kelly retrieved the pistol from the brown bag, which Marlborough personally knew to belong to Selvage, out of the trunk of an automobile (R VII 2689, 2692-93). Moreover, while at

---

[4]At least three slugs recovered from the interior of Ventura's Jewelry, State's Exhibits 75 (behind credenza), 78 (south wall) and 116 (box in front office), were fired from State's Exhibit 66, the chrome plated Titan .38 Special that Kelly retrieved from Selvage's bag and gave to Carl Marlborough after the robbery-homicide (R VII 2518-19, 2532, 2583-84, 2591-93, 2690-94, 2758-62).

[5]In one of his confessions, Selvage stated that the day before the offense he and Kelly had "spotted" the store. The night before the offense, he asked "Cal" if he could get him a gun and "Cal" procured a chrome plated .38 for Selvage (R VIII 3039). However, Selvage's confessions, though ruled admissible (R III 884), were not introduced into evidence at trial.

the trunk of the car, Marlborough observed a dark colored pistol in the blue bag. Marlborough knew that particular pistol belonged to Kelly (R VII 2690, 2714).[6] At Kelly's request, Marlborough sold State's Exhibit 66 to Johnny Davis (R VII 2692).

2. Facts adduced at punishment phase of trial

Additional evidence was presented at the punishment phase to establish Selvage's willingness to employ lethal force in committing a robbery. Michael Edward McWilliams testified that on July 26, 1979, four days before the instant offense, Selvage and another man attempted to rob the Stop'N Go convenience store at which McWilliams worked (R VII 2834-44). McWilliams was ordered into the bathroom while Selvage and his accomplice set out to rob the store (R VII 2840-41). Selvage returned to the bathroom to ask McWilliams how much money was in

[6]There was conflicting evidence as to which of the robbers possessed which pistol. No person in Ventura's Jewelry could identify any particular weapon as being used by a particular assailant. Mildred Cook, who observed the shootout in the street outside the store, testified that she saw the person leaning over the car on the passenger side, which Ventura identified as Selvage, in possession of the "shiny" pistol, similar to State's Exhibit 66 (R VII 2455, 2458, 2459). Nicholas Bartell, who also observed the shootout in the street, testified that the individual on the driver's side of the Cadillac had the shinier pistol (R VII 2463). Two women who drove by the scene of the shootout and later observed the assailants on a freeway likewise gave conflicting testimony. Judy Cardwell observed the taller of the two black men to be carrying a shiny pistol, similar to State's Exhibit 66 (R VII 2490-91). Previous testimony established that Selvage was the taller of the two assailants (R VI 2352; VII 2397-98). C.D. Bayes, the driver of the car, testified that the taller of the two men had a revolver with a six or seven-inch barrel that was dark and not shiny (R VII 2505-06).

the bottom of the safe and, as he cocked his gun and pointed it at McWilliams, stated that he would shoot McWilliams if he did not tell him how much money was in the bottom of the safe (R VII 2842-44). McWilliams believed Selvage was going to kill him (R VII 2844). Between 30 and 45 minutes after he was forced into the bathroom, McWilliams heard two shots, followed by a scream for help (R VII 2845). When McWilliams came out of the bathroom, he observed Corey Alio wounded by a gunshot in the abdomen (R VII 2846-48). Alio died shortly thereafter.

Al Bell and a friend walked into the Stop 'N Go to buy a frozen pizza. Upon entering, he observed two black men talking, one of whom was Selvage, and did not see the store clerk (R VII 2866-67). As Bell and his friend were in the back of the store, one of the two black men, holding a gun, told Bell and his friend to lie on the floor, where they were searched and their wallets were taken (R VII 2868-69). The second black man told the first to take Bell's watch, but the first black man said "no, you don't want that watch, it's too cheap" (R VII 2869).

In addition to offering penitentiary records establishing that Selvage had been convicted on two prior occasions, in 1976 for conspiracy to commit bank robbery and in 1972 for possession of a controlled substance (R VIII 3210), the state offered the testimony of Captain Ronald L. Cherry of the New Orleans Police Department. Operating on information received in the New Orleans Police Department House of Detention, Cherry apprehended Selvage, housed in the maximum security area of the prison, as he escaped from that institution in 1975 (R VII 2896-98). Investigation revealed that Selvage, with the assistance of a second person, smuggled a chisel and sledge hammer into the prison, chiseled through some concrete pilings and

attempted to lower himself from the sixth floor by a rope made of torn blankets (R VII 2898, 2899-2900). The rope broke, causing Selvage to drop four floors and sustain bodily injury (R VII 2898).

Selvage introduced testimony from his sister, Audrey Picou, that he had been a non-aggressive, church-going person while growing up in New Orleans. Selvage was interested in art and music and was an honor student in high school (R VII 2907-09). Rather than attend college, Selvage was drafted into the military, where he served from 1968 through 1970. Selvage was sent to Southeast Asia, but returned in a "strait jacket," suffering from heroin addiction (R VII 2909-10). He was treated in Houston and Florida before being released (R VII 2910). However, from the time of his return from Southeast Asia, Selvage was a changed person (R VII 2911). Selvage was able to obtain work (R VII 2910-11), and Picou never saw Selvage under the influence of drugs, nor did Selvage smoke marijuana or drink liquor while he was in her presence (R VII 2911). Selvage would visit Picou once or twice a week (R VII 2913). Picou characterized Selvage as a follower (R VII 2911) and stated she never saw Selvage with a weapon, never saw him act violently and considered him non-violent (R VII 2912).

Selvage further offered the testimony of Dr. Jose Garcia, Chief of Medical Health Services for the Texas Department of Corrections Mental Association (R VII 2925). Dr. Garcia described several penitentiary programs that would be available to treat Selvage and the testing and therapies available to use in rehabilitative planning (R VII 2926, 2928-31). Garcia further testified to the drug rehabilitation programs available in the Department of Corrections (R VII 2933-34) and that he had never encountered an inmate who could not be helped by the programs (R VII 2935-36).

3. Facts adduced in state habeas corpus proceedings

In his state habeas corpus application, Selvage offered five pieces of evidence: a summary by an Air Force doctor, dated February 5, 1970, *Ex parte Selvage*, No. 16,884-02 at 44-45; excerpts from Selvage's medical record while in federal prison, *id.* at 47-57; a letter detailing an evaluation of Selvage's mental status from Dr. James Merikangas, dated January 20, 1988, *id.* at 77-81; Texas Department of Corrections medical clinic notes covering the period February 7, 1985, through December 11, 1986, *id.* at 83-95; and an affidavit from John Emmett Crow, Selvage's trial counsel, executed on January 19, 1988. *Id.* at 97-100. In his summary, Air Force Dr. Don G. Fenner stated Selvage complained that for two months he could not concentrate at work, causing Selvage's supervisor to "get mad at him." Selvage complained to Fenner of hearing "voices" that would keep him up at night. Selvage's sergeant also asked Fenner to see Selvage after he threatened to kill the supervisor; however, before he could be seen for the evaluation, Selvage rammed his fist through a window to catch the people who were "spying" on him. Selvage also complained that he and his supervisor had multiple disagreements, that the supervisor believed his work was poor because he was "on drugs," and that he felt people were watching him everywhere. While Selvage acknowledged taking barbiturates prior to entering the Air Force, he denied drug use subsequent to enlisting.

Selvage submitted to urinalysis, which was "within normal limits." The doctor concluded that the auditory hallucinations were "questionable" and had subsided. His IQ tested at 78, and he remained quiet, aloof and withdrawn in group therapy sessions. The doctor diagnosed Selvage as possessing "depressive

neurosis" and "passive-aggressive personality," and, because of his low intelligence and "slow, rather stubborn lifestyle," recommended that Selvage be medically discharged.

Selvage's federal prison medical records reveal that Selvage received Dilantin, Cogentin and Thorazine in 1977 and 1978, and was evaluated for residual back, foot and head injuries. *Ex parte Selvage*, No 16,884-02 at 47-57.

Dr. Merikangas described Selvage's medical and mental history and the results of various reflex tests performed, most of which appeared normal, but "some minor reflex asymmetries and sensory findings [are] suggestive of a brain injury." Merikangas then described a "psychotic break" of Selvage's that occurred between Merikangas' two visits. Merikangas then opined that Selvage was not fully responsible for his capital murder due to a combination of psychosis and the residual effects of "severe" drug abuse, which diminished his ability to appreciate the wrongfulness of his conduct and rendered him less than capable of conforming his conduct to society's norms. Selvage's "probable" brain injury[7] compounded preexisting

[7]As one progresses through Dr. Merikangas' letter regarding an evaluation conducted *nine years* after Selvage's crime, it is noted that Marikangas continues to elevate his description of the physical condition of Selvage's brain. He originally notes that, despite the fact that all cranial nerves are normal and there is no indication of epilepsy, "minor" reflex asymmetries and sensory findings are "suggestive" of brain injury. However, in formulating his opinion in hindsight on Selvage's mental status nine years earlier, Merikangas declares brain injury to be "probable." The Court should note that Selvage has *never* produced *any* evidence of brain injury, despite the availability of extensive neurological testing equipment at the Texas Department of Corrections, where Dr. Merikangas performed his examination (R VII 2929-30).

psychosis because such an injury lowers a person's ability to control impulses, likely causing Selvage to misperceive simple gestures as threatening. Thus, in Merikangas' opinion, Selvage *could* have been unusually susceptible to coercion, influence and designs of others. Moreover, Merikangas concluded that, if maintained on proper medication, Selvage poses no more of a threat for future violence than any non-psychotic person. Merikangas concluded his evaluation by stating that Selvage's prior mental history was easily obtainable by any person who wanted to look for it and any open-minded person would have perceived his symptomology.

In his January 19, 1988, affidavit, attached hereto as Appendix A, Selvage's trial attorney, John Crow, stated that he and co-counsel decided at an early stage that they would not present evidence of mental illness at the punishment phase of trial because the jury would not have been able to consider such evidence as mitigating. In light of the state's practice at the time of trial of presenting psychiatrists who would testify that mental disorders increased the likelihood of future violence, the state would have been able to convert otherwise mitigating evidence into aggravating evidence. Moreover, Crow stated that, although mental disorder was relevant to the question whether Selvage acted deliberately, the jury would have no meaningful way of considering such evidence as a mitigating circumstance. In Crow's opinion, Selvage's jury could have readily determined his actions to be sufficiently deliberate to satisfy Texas' capital sentencing statute, and juries would rarely find mental illness sufficiently incapacitating to interfere with a defendant's ability to engage in deliberate conduct.

In a subsequent affidavit executed on February 16, 1988, and offered by the state, attached hereto as Appendix B, Crow explained his first affidavit. Crow and co-counsel were appointed to represent Selvage prior to his arrest in New Orleans. Upon Selvage's arrest, counsel travelled to New Orleans and met with him on two occasions to discuss his case. Selvage was lucid and coherent, soft-spoken and well-mannered and able to remember details of the offense as well as the manner in which his two confessions were taken. Selvage consistently claimed that Kelly was the triggerman in the robbery-homicide.

Selvage gave counsel no reason to believe that he was anything other than sane or competent. His confessions, testimony in the pretrial hearings, communication with counsel and asking of pertinent questions demonstrated his competence to counsel. Moreover, counsel interviewed Selvage's family and learned of his stable family life prior to entering the military and his changed behavior after discharge. Selvage's family stated that Selvage had no prior psychiatric treatment or mental problems. Counsel inquired of Selvage whether he had any prior mental history and, while counsel could not remember his precise answer, he felt certain that the response conformed with his personal observations.

Selvage's family attributed his changed behavior to hard drug addiction. The fact that Selvage had been discharged from the military for use of alcohol and/or drugs, as disclosed by the prosecution, was consistent with the family's conclusion. Thus, while counsel believed Selvage suffered from a serious heroin habit and was probably under the influence of drugs at the time of the offense, voluntary intoxication and diminished capacity were not defenses under state law, and counsel did not believe that Selvage suffered from

any mental defect that would have interfered with his ability to know right from wrong or to conform his conduct to the requirements of law. Had counsel believed Selvage had such a defect, counsel would have secured a psychiatric examination, regardless of his perceptions regarding trial strategy and presentation of psychological evidence as a mitigating factor.

Counsel thus devised a trial strategy focusing on identity at guilt-innocence by suggesting that some other person, perhaps Eugene Waddis, accompanied Wilbur Kelly and Brenda Joseph. Second, the defense attempted to demonstrate that Selvage was a non-triggerman and, thus, could not be found to have deliberately caused the death of the deceased, as required by the first special punishment issue. Counsel decided as a strategic matter not to present psychological evidence regarding drug problems and attendant drug-related mental conditions. Counsel believed that juries were just as likely to consider such evidence aggravating as they would consider it mitigating. Likewise, counsel was dissuaded by the possibility of the state rebutting any psychological evidence in mitigation with harmful evidence discovered in an evaluation. Hence, counsel decided on a strategy to introduce equivalent evidence without bearing such a risk. By introducing the testimony of Selvage's sister, which detailed his family background and accomplishments as a young adult, his addiction to heroin and his resultant behavioral change in conjunction with Dr. Garcia's testimony regarding the treatment programs available in prison, counsel believed he provided the jury with a basis for concluding that Selvage would not be a continuing threat to society.

SUMMARY OF ARGUMENT

The Court should not address Selvage's argument that the state procedural bar was not properly applied in his case, because it was neither presented to nor addressed by the courts below. Selvage did not maintain, either in the trial court or the Court of Criminal Appeals, that the state's contemporaneous objection rule is not regularly and consistently applied to claims such as his, or that it is not based on an adequate and independent state law ground, nor did he object to its imposition on this basis in federal court. Indeed, in his federal habeas petition and in his petition for writ of certiorari, he acknowledged the legitimacy of the bar by attempting to show cause for his failure to timely object, and by arguing that application of the procedural default doctrine would result in a fundamental miscarriage of justice. Further, his argument is outside the scope of the question on which certiorari was granted, and the Court will consider such issues only in exceptional circumstances. Selvage points to no such circumstances in this case and none exist.

Even were the Court to consider Selvage's claim, it is meritless. As for his assertion that Texas courts will treat *Penry* claims under their novelty exception to the contemporaneous objection rule, that is solely a matter of state law over which this Court has no supervisory authority. Further, Selvage's claim that the Court of Criminal Appeals does not consistently impose its procedural bar is belied by the facts. In most of the cases cited by Selvage, the defendants challenged the constitutionality of the Texas capital-sentencing statute on its face, rather than as applied, as Selvage does. The few instances where the court did address unpreserved claims do not undermine the validity of the Texas rule. In cases such as Selvage's,

the state courts have consistently and routinely applied their procedural bar to review of the claim. Finally, the Texas contemporaneous objection rule has an independent state basis. In Texas, the failure to object to jury instructions at trial waives all but fundamental error. "Fundamental error" is a narrow concept, and is not co-extensive with constitutional error. In fact, it is well settled under Texas law that even constitutional rights are waived by the failure to object. An error is fundamental only if it is so egregious that the defendant has not had a fair and impartial trial. The court's analysis of fundamental error focuses on the nature of the harm suffered by the defendant, not the nature of the alleged error. Thus, the rule is not dependent on a determination of the validity of the underlying constitutional claim.

Under this Court's precedents, the perceived futility of obtaining relief will not satisfy the cause prong of the procedural default doctrine. On the other hand, where the factual or legal basis for making a claim was novel and not reasonably available at the time of trial, the cause requirement is met. The tools for making a claim are available when existing case law would allow an attorney to reasonably extrapolate and apply the principles to his own case. The facts that other attorneys were making similar arguments and that the claims were being recognized in other courts are significant factors in determining whether a claim was available to a particular defendant. The claim Selvage now makes plainly was not novel at the time of his 1980 trial. The legal basis for his claim was announced by this Court in 1976 in *Woodson v. North Carolina* and *Jurek v. Texas*, and further refined in *Lockett v. Ohio* in 1978. Similar claims had been perceived and were being made in reported state court cases well before Selvage's trial. Finally, Selvage's trial attorney has acknowledged in his affidavit that he

was aware that the jury would not be able to consider certain of his evidence as mitigating. Consequently, his failure to object to the trial court's jury instructions cannot be excused by the novelty exception to the procedural default doctrine.

Valuable considerations are furthered by rejecting the concept of futility as cause for a procedural default. The development of the law will be fostered by requiring that issues not yet firmly established be litigated at the trial and direct appeal level, rather than in collateral proceedings. Moreover, both the adversary system and criminal defendants will benefit where counsel has incentive for raising perceived constitutional violations at the time they occur. Further, comity and finality, important aspects of our system of federalism, will be furthered by requiring that constitutional claims be litigated and resolved in state court. As co-equal protectors, with the federal courts, of constitutional rights, the state courts will be encouraged to act responsibly and conscientiously in reviewing claims of constitutional violations. The criminal trial will be, as it should be, the main event, where issues of guilt and innocence and proper punishment are decided at a time when the facts can most accurately be developed.

This Court has long recognized that the federal courts have a duty to prevent the application of the procedural default doctrine from producing a fundamental miscarriage of justice. In most cases victims of such miscarriages of justice will be able to meet the cause and prejudice requirements to defeat imposition of a procedural bar. The Court has fashioned an exception for the extraordinary case where a constitutional violation has resulted in the conviction of an actually innocent person. Selvage's attempt to enlarge this exception to include a deprivation of a "basic trial

process" is devoid of factual and legal support. His claim that the trial court's failure to *sua sponte* instruct the jury on consideration of mitigating evidence amounted to such a deprivation ignores the operation of state law. He cannot deny that the procedures were in place under state law for him to request special instructions at trial, nor can he deny that state law did not prohibit the giving of such instructions. Further, there was no impediment to his introduction of the evidence he now proffers, and if the trial court had limited the admissibility of his evidence, he could have perfected a bill of exceptions. Thus, he can claim no deprivation of a basic trial process. His characterization of *Penry* error as *per se* harmful and a denial of a basic trial process is contrary to this Court's decision in *Franklin v. Lynaugh*.

A defendant can show his actual innocence of the death penalty by establishing that he is a member of a class for whom the death penalty is unavailable as a matter of constitutional or state law. Selvage can make no such showing. While it would be appropriate for the Court to end the inquiry at this point, should the Court wish to allow a petitioner to demonstrate his actual innocence through evidence that mitigates against but does not prohibit a death sentence, it should adopt a rule requiring the petitioner to demonstrate the existence of mitigation so compelling that no rational fact-finder would have concluded that death was appropriate. Selvage's evidence, including his newly proffered psychiatric evidence, which is of questionable reliability, falls far short of meeting this standard.

ARGUMENT

I.

SELVAGE'S CLAIMS THAT PROCEDURAL DEFAULT IS NOT REGULARLY APPLIED IN TEXAS AND THAT THE PROCEDURAL BAR IS NOT AN INDEPENDENT STATE GROUND EXCEED THE QUESTION UPON WHICH CERTIORARI WAS GRANTED AND, THUS, ARE NOT PROPERLY BEFORE THE COURT; ALTERNATIVELY, TEXAS COURTS DO ROUTINELY AND REGULARLY APPLY PROCEDURAL BARS TO REVIEW OF *PENRY* CLAIMS AND TEXAS' PROCEDURAL REQUIREMENT IS AN INDEPENDENT STATE GROUND.

A. The Court should not address arguments which exceed the scope of the question presented and which were neither presented to nor considered *sua sponte* by the courts below.

Selvage argues that the Court should ignore his procedural default for three reasons. First, Selvage asserts that the state courts' imposition of a procedural bar to review should not be honored because it has not been routinely and regularly applied by the state courts in the past. Second, he asserts that this Court should interpret Texas law and conclude that the procedural bar would now be excused because the Court's constitutional rule announced in *Penry v. Lynaugh*, ___

U.S. ___, 109 S.Ct. 2934 (1989), was not recognized in Texas at the time of his trial. Finally, he asserts that procedural default is inappropriate because the state court rule is dependent on a federal constitutional ruling and, thus, is not an "independent" state ground.

In his brief on the merits, Selvage for the first time asserts that the procedural bar imposed by the Texas courts is not an independent and adequate state ground that will foreclose federal review of his claim. Although he now claims that state law required review of *Penry* claims at the time of his trial, Selvage never made such an argument either at the time the state asserted in state court the existence of a bar to review or at the time that the state courts imposed the bar. At no time in federal court did Selvage rely on this argument to avoid the consequences of his procedural default, and the record is devoid of briefing or factual development on this issue. The issue of the adequacy and independence of the state procedural ground was not mentioned in Selvage's petition for certiorari review and is beyond the scope of the question upon which this Court granted certiorari. In addition, the brief of *Amicus* Harvey Earvin attempts to inject factual matters into this case that were not presented to or considered by the lower federal courts.

The Court has jurisdiction in a case coming from federal court to consider an issue not raised below. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). It will not do so, however, in the absence of exceptional circumstances. *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There are no exceptional circumstances here that would warrant the Court's consideration of Selvage's new argument that the Texas procedural bar should be disregarded in this case. For example, his argument is not made as an alternative basis in

support of the judgment of the court below. *Berkemer v. McCarty*, 468 U.S. at 436 n.23. Rather, he seeks to set aside the judgment of the court of appeals for reasons that he could have, but did not, present to that court. In addition, the state strenuously objects to the argument being made for the first time in Selvage's brief on the merits. *See City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258 (1987) (Court will not exercise jurisdiction where issue was not argued in court of appeals, petition for writ of certiorari did not present the issue, and respondent vigorously objected to issue being raised at first point she had notice that question was being presented, *i.e.*, in her response to brief on the merits); *cf. Carlson v. Green*, 446 U.S. at 17 n.2 (issue not raised in lower court would be considered by Supreme Court where respondent did not object to having question decided).[8]

Indeed, in his Motion to Certify Question to Texas Court of Criminal Appeals, filed in the Court on November 9, 1989, Selvage admitted that the Fifth Circuit's determination that the state courts relied on procedural default "found support in state law." *See* Motion to Certify Question to Texas Court of Criminal Appeals at 2. Having once conceded that the procedural bar rested on adequate and independent state law grounds, Selvage should not be heard now to complain that it does not. Moreover, Selvage further conceded the independent and adequate character of the state rule by asking the Court in his petition for writ of certiorari to consider whether he had established "cause" for his procedural default and, if not, whether imposition of the procedural bar would result in a fundamental miscarriage of justice. *See* Petition for Writ of Certiorari at 10-14. Thus, it cannot be said that this issue is "fairly included" within the question on which certiorari was granted. Sup.Ct.R. 21.1(a).

[8]The state nonetheless has briefed the issues improperly presented by Selvage, not in acquiescence to his action but solely to provide the Court with the state's position should the Court decide to address the issues. This briefing should not be considered consent on the state's part, and the state reiterates its strenuous objection to Selvage having improperly raised new issues.

B. Texas courts have consistently and regularly imposed a procedural bar to foreclose review of claims alleging erroneous jury instructions during capital sentencing proceedings.

Under Texas law, alleged error concerning jury instructions is generally waived or not preserved for review where the defendant did not object to the jury instructions actually given or request special instructions. Tex. Code Crim. Proc. Ann. arts. 36.14, 36.15, 36.19 (Vernon Supp. 1989); *Johnson v. State*, 629 S.W.2d 731, 733 (Tex. Crim. App. 1981); *Duffy v. State*, 567 S.W.2d 197, 204 (Tex. Crim. App. 1978). The Court of Criminal Appeals of Texas has regularly applied a procedural bar to capital defendants' claims that the jury instructions in their cases were constitutionally inadequate to allow for consideration of their mitigating evidence. *Perillo v. State*, 758 S.W.2d 567, 577 (Tex. Crim. App. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3263 (1989) (noting that the defendant did not object to the jury instructions and that such claims have been rejected even with timely objection); *Pyles v. State*, 755 S.W.2d 98, 123 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 543 (1988) (finding "[n]othing is preserved for review" in connection with the defendant's challenge to Texas capital sentencing statute, because he did not object to the statute or jury instructions and presented no mitigation evidence); *Fierro v. State*, 706 S.W.2d 310, 318 (Tex. Crim. App.

1986) (because defendant failed to object or request instructions, nothing is presented for review); *[Anthony Charles] Williams v. State*, 622 S.W.2d 116, 120 (Tex. Crim. App. 1981), *cert. denied*, 455 U.S. 1008 (1982) (because of the failure to object or request instructions, nothing is presented for review).

Moreover, the Court of Appeals for the Fifth Circuit has correctly recognized that the Court of Criminal Appeals has applied a procedural bar to foreclose review of death-sentenced petitioners' claims that punishment-phase jury instructions were insufficient to provide full consideration of their mitigating evidence. *Fierro v. Lynaugh*, 879 F.2d 1276, 1281 (5th Cir. 1989); *McCoy v. Lynaugh*, 874 F.2d 954, 958 (5th Cir.), *stay denied*, ___ U.S. ___, 109 S.Ct. 2114 (1989); *King v. Lynaugh*, 868 F.2d 1400, 1403 (5th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1563 (1989); *Bridge v. Lynaugh*, 856 F.2d 712, 713, *on reh'g*, 863 F.2d 370 (5th Cir.), *stay granted*, ___ U.S. ___, 109 S.Ct. 20 (1989); *Bell v. Lynaugh*, 858 F.2d 978, 981 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3262, *reh'g denied*, ___ U.S. ___, 110 S.Ct. 223 (1989); *Landry v. Lynaugh*, 844 F.2d 1117, 1122 (5th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 248 (1988); *[Calvin Joseph] Williams v. Lynaugh*, 837 F.2d 1294, 1296 (5th Cir. 1988); *Streetman v. Lynaugh*, 835 F.2d 1519, 1520 (5th Cir.), *stay denied*, ___ U.S. ___, 108 S.Ct. 588 (1988); *see also Thompson v. Lynaugh*, 821 F.2d 1054, 1062-63 (5th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 5 (1987) (recognizing state courts' imposition of procedural bar to foreclose review of alleged error stemming from trial court's failure to instruct the jury on inapplicability of law of parties at the punishment phase of trial).[9]

[9]In addition, the state is aware of at least ten cases in which on state habeas review the Texas Court of Criminal Appeals has imposed a procedural default to review of death-sentenced

(Footnote continued on next page)

Many of the cases cited by Selvage and *Amicus* Harvey Earvin for the proposition that the Texas courts have not regularly imposed procedural bars involved facial, rather than as applied, challenges to the capital sentencing scheme. *Motley v. State*, 773 S.W.2d 283, 286 (Tex. Crim. App. 1989); *Wilkerson v. State*, 726 S.W.2d 542, 547-48 (Tex. Crim. App. 1986); *Williams v. State*, 674 S.W.2d 315, 321 (Tex. Crim. App. 1984); *Adams v. State*, 577 S.W.2d 717, 729-31 (Tex. Crim. App. 1979), *rev'd on other grounds sub nom. Adams v. Texas*, 448 U.S. 38 (1980).

For example, in *Motley v. State*, 773 S.W.2d at 286, the defendant claimed that the absence of a statutory definition of "deliberately," as utilized in the first special sentencing issue, precludes the jury from considering mitigating circumstances. He did not contend that he presented evidence that could not be given mitigating effect because of the lack of a definition. The Court of Criminal Appeals rejected this facial challenge and, in any event, concluded that

(Footnote continued from previous page)
petitioners' claims that the jury instructions were constitutionally inadequate to allow for consideration of mitigating evidence. *Ex parte Curtis Lee Johnson*, Application No. 15,840-02 (Tex. Crim. App. October 19, 1987); *Ex parte Mario Marquez*, Application No. 17,898-01 (Tex. Crim. App. January 4, 1988); *Ex parte Robert Nelson Drew*, Application No. 13,998-02 (Tex. Crim. App. June 14, 1988); *Ex parte Curtis Paul Harris*, Application No. 17,919-01 (Tex. Crim. App. August 19, 1988); *Ex parte Federico Martinez Macias*, Application No. 17,991-03 (Tex. Crim. App. October 25, 1988); *Ex parte Harold Amos Barnard*, Application No. 14,264-04 (Tex. Crim. App. January 6, 1989); *Ex parte Paul Rougeau*, Application No. 19,419-01 (Tex. Crim. App. March 7, 1989); *Ex parte James Michael Briddle*, Application No. 20,103-01 (Tex. Crim. App. April 14, 1989); *Ex parte Billy Joe Woods*, Application No. 10,855-02 (Tex. Crim. App. July 7, 1989); *Ex parte James Emery Paster*, Application No. 15,995-02 (Tex. Crim. App. September 19, 1989).

Motley had no standing to make such a challenge because he had not shown that the statute had such an effect in his case.

Similarly, in *Williams v. State*, 674 S.W.2d at 321, the defendant:

> "challenge[d] the constitutionality of Art. 37.071(b)(1), V.A.C.C.P. as this Court has construed it by its decisions following *Jurek v. Texas*, 428 U.S. 262 . . . (1976). Appellant contends that this Court's interpretation of Art. 37.071(b)(1) has so limited the deliberateness issue as to no longer include proper consideration of miti-gating evidence. . . ."

The Court of Criminal Appeals rejected his interpretation of its case law construing "deliberately" and overruled his attack on the constitutionality of the first punishment phase issue. A fair reading of *Williams* demonstrates that the defendant was not challenging the instructions given in his case but rather the Court of Criminal Appeals' "narrow" construction of the term "deliberately."

In *Adams v. State*, 577 S.W.2d at 729, the Court of Criminal Appeals again was confronted with a challenge to the facial validity of Tex. Code Crim. Proc. Ann. art. 37.071. Adams contended that the statute was unconstitutional because it did not provide standards to allow the jury to determine whether a convicted capital murderer "ought to die," or provide for a life sentence even if all the special sentencing issues were answered in the affirmative. The Court of Criminal Appeals' rejection of the facial challenge to the statute, *id.* at 730, provides absolutely no support for Selvage's belated contention that the state court

does not consistently or regularly impose its procedural bar to unpreserved as-applied challenges.

The defendant in *Wilkerson v. State*, 726 S.W.2d at 547-48, likewise mounted a facial attack on the constitutionality of the Texas capital-sentencing statute. He asserted that the second special sentencing issue was impermissibly vague in that predictions of future dangerousness are inherently speculative and the undefined term "probability" is a source of ambiguity and vagueness; Wilkerson did not, however, contend that the alleged vagueness operated to prevent the jury from considering mitigating evidence. The Court of Criminal Appeals did not neglect to impose an otherwise applicable procedural bar.

Thus, the Court of Criminal Appeals of Texas has regularly applied its procedural rule to death-sentenced defendants' claims that the statutory sentencing issues, in their particular cases, unconstitutionally precluded the jury from considering mitigating evidence. Consequently, the Texas contemporaneous objection rule is "adequate" and should be respected by the federal courts. *Dugger v. Adams*, ___ U.S. ___, ___, 109 S.Ct. 1211, 1217 n.6 (1989). The few cases cited by Selvage and *Amicus* Harvey Earvin are insufficient to undermine the adequacy of the state procedural rule. *Id.*

C. The state courts' contemporaneous objection rule is an "independent" state ground.

Selvage contends that the procedural bar imposed in his case should not be respected because of the possibility that Texas courts might, at some point in the future, determine that this Court's decision in *Penry v. Lynaugh*, ___U.S. ___, 109 S.Ct. 2934 (1989),

constitutes a sufficient change in the law to excuse the absence of a contemporaneous objection. The Texas Court of Criminal Appeals employs a state law standard to determine whether a decision of this Court is so novel that a criminal defendant's failure to preserve error is excused.

> [W]here a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver.

Ex parte Chambers, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984), *cert. denied sub nom. Texas v. Chambers*, 474 U.S. 864 (1985) (Campbell, J., concurring). Thus, whether a *Penry* claim would fall within the novelty exception recognized by the Texas courts is exclusively a matter of state law, *id.*, and this Court neither exercises supervisory authority over state courts nor sits to decide questions of state law. *See Smith v. Phillips*, 455 U.S. 209, 221 (1982).

Moreover, "a state's subsequent acceptance of an argument ... is irrelevant to the question whether the default should be excused on federal habeas." *Smith v. Murray*, 477 U.S. 527, 534 (1986). Thus, this Court's review is properly limited to the question upon which certiorari was granted: whether at the time he was tried Selvage had cause for his failure to object which would overcome the procedural bar imposed by state courts and whether the preclusion of federal habeas review based on the state courts' imposition of the bar would result in a fundamental miscarriage of justice.[10]

---

[10]As set forth in the state's Opposition to Motion to Certify Question to Texas Court of Criminal Appeals, Selvage's assertion that the Court of Criminal Appeals might in the future find the decision in *Penry* to constitute a sufficient change in the law to

(Footnote continued on next page)

Relying on *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), Selvage also asserts that the ruling of the court below does not rest on state law grounds which are "independent" of his federal constitutional claim, because *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984), requires the Court of Criminal Appeals to consider whether an asserted charging error is "fundamental" before applying the statutory contemporaneous objection rule, and in making this determination the court necessarily reached the merits of his Eighth Amendment claim. Thus, he argues that, because the state court necessarily considered his Eighth Amendment claim, the state procedural rule is not an "independent" state ground which can foreclose from federal habeas review his challenge to the failure to instruct the jury on consideration of mitigating evidence.

Contrary to Selvage's assertion, the Court of Criminal Appeals was not required to consider the merits of his Eighth Amendment claim before determining that he did not assert fundamental error which would negate the contemporaneous objection requirement. Rather, the sole inquiry inherent in the state's fundamental error analysis is whether the error resulted in such egregious harm that it deprived him of a fair and impartial trial. *See Almanza v. State*, 686 S.W.2d at 171.

(Footnote continued from previous page)
excuse the procedural default is contrary to the established precedent of that court. Moreover, even assuming, *arguendo*, that at some future date the Court of Criminal Appeals decides that *Lockett*-type claims are sufficiently novel as a matter of state law to excuse a failure to comply with state procedure, Selvage, like Chambers, would have an available forum and remedy in the Texas courts.

In Texas, review of jury charge error is governed by Tex. Code Crim. Proc. Ann. arts. 36.14-36.19 (Vernon 1981). Article 36.14, addressing objections to the charge and the requirements to preserve resulting error, provides, in pertinent part:

> Before said charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection. Said objections may embody errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts, and in no event shall it be necessary for the defendant or his counsel to present special requested charges to preserve or maintain any error assigned to the charge, as herein provided. . . . Compliance with the provisions of this Article is all that is necessary to preserve, for review, the exceptions and objections presented to the charge and any amendment or modification thereof.

Article 36.15, governing requested special charges, states, in pertinent part:

> The defendant may, by a special requested instruction, call the trial court's attention to error in the charge, as well as omissions therefrom, and no other exception or objection to the charge shall be necessary to preserve any error reflected by any special requested instruction which the trial court refuses.

Article 36.19, governing the scope of appellate review of errors not preserved under Articles 36.14 and 36.15, states:

> Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17 and 36.18 has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. All objections to the charge and to the refusal of special charges shall be made at the time of trial.

Thus, absent an objection or a specially requested instruction, a criminal defendant waives all but fundamental error. *Grady v. State*, 614 S.W.2d 830, 831 (Tex. Crim. App. 1981); *White v. State*, 610 S.W.2d 504, 506 (Tex. Crim. App. 1981). Under Texas law, the spectrum of "fundamental" error is exceedingly narrow, and the unobjected-to error which Selvage now raises falls outside those limited parameters. To support a claim of fundamental error in the jury charge, a criminal defendant must show "egregious harm."

> [I]f no proper objection was made at trial and the accused must claim the error was "fundamental," he will obtain reversal only if the error is so egregious and created such harm that he "has not had a fair and impartial trial"-- in short "egregious harm."

Almanza v. State, 686 S.W.2d at 171. This fundamental error inquiry clearly would not require the Court of

Criminal Appeals to consider the merits of Selvage's Eighth Amendment claim.

To the extent that Selvage asserts that no objections or special requested instructions were necessary to preserve error pursuant to Article 36.19 because the trial court's failure to *sua sponte* instruct the jury on consideration of mitigating evidence constituted fundamental error, it is clear that he raises an issue of state law which is not properly a subject of federal habeas review. *See Smith v. Phillips*, 455 U.S. at 221. Moreover, his apparent assertion that, in the aftermath of *Penry v. Lynaugh*, the Court of Criminal Appeals is likely to change its determination that the omission of a punishment-phase instruction concerning mitigating evidence is not fundamental error, is contrary to established state precedent.

Under Texas law, a criminal defendant is entitled to a charge on a defensive theory raised by the evidence. *Lugo v. State*, 667 S.W.2d 144, 146 (Tex. Crim. App. 1984); *Garcia v. State*, 605 S.W.2d 565 (Tex. Crim. App. 1980). Nevertheless, the Court of Criminal Appeals has consistently rejected the proposition that a trial court's failure to *sua sponte* submit defensive issues constitutes fundamental error. *See Johnson v. State*, 629 S.W.2d at 733; *Boles v. State*, 598 S.W.2d 174 (Tex. Crim. App. 1980) (failure to charge on lesser included offense); *Perez v. State*, 495 S.W.2d 242 (Tex. Crim. App. 1973) (failure to submit issue of entrapment or status as an accommodation agent for state's witness); *White v. State*, 495 S.W.2d 903 (Tex. Crim. App. 1973) (failure to submit issue of mere presence at scene of drug sale); *Martinez v. State*, 448 S.W.2d 488 (Tex. Crim. App. 1970) (failure to submit issue of self-defense).

Although Selvage has yet to articulate the punishment phase instruction which he claims should have been submitted at his trial, the type of instruction to which he alludes is in the nature of a defense to the death penalty. That is, Selvage claims entitlement to an instruction by which the jury could find him guilty of capital murder beyond a reasonable doubt; find beyond a reasonable doubt that the special sentencing issues should be answered affirmatively; and yet decline to impose the death penalty because of some excuse which reduces his culpability. *See Barnette v. State*, 709 S.W.2d 650, 652 (Tex. Crim. App. 1986) (the nature of defenses to conviction is to allow the jury to find that the state has proven the elements of the crime and nonetheless find the defendant not guilty).

The Court of Criminal Appeals confronted a similar situation to that posed by Selvage's claim in *Johnson v. State*, 629 S.W.2d at 733, a capital murder case in which the evidence adduced at trial raised the issue of provocation by the deceased. Because there was evidence that the deceased shot at the defendant prior to the capital murder, the capital sentencing statute, Tex. Code Crim. Proc. Ann. art. 37.071 (b), mandated submission of a third special sentencing issue on provocation. Although the Court of Criminal Appeals recognized that the imperfect self-defense claim may have been sufficiently mitigating to militate against a death sentence, it nonetheless held that the trial court's failure to *sua sponte* submit the third special issue did not constitute fundamental error. *Id.* at 733. *Cf. Evans v. State*, 601 S.W.2d 943 (Tex. Crim. App. 1980) (refusal to submit a special issue on provocation *after defendant's timely request* constitute reversible error). Since omission of defensive issues at the guilt-innocence phase or the third special issue at the punishment phase are not fundamental error, it follows that subordinate issues relating to mitigating

evidence similarly are not considered fundamental error under Texas law.

Moreover, the fact that an asserted error arguably implicates a constitutional provision does not make it a fundamental error for which no objection is required for appellate review. It is well settled under Texas law that even constitutional rights may be waived by the failure to object at trial. The Court of Criminal Appeals has not hesitated to impose a procedural bar in the face of constitutional claims not timely asserted. *See, e.g., Russell v. State*, 665 S.W.2d 771, 778 (Tex. Crim. App. 1983) (Fourth Amendment claim); *Rogers v. State*, 640 S.W.2d 248, 265 (Tex. Crim. App. 1982) (alleged due process violation in proceedings revoking probation); *Mathews v. State*, 768 S.W.2d 731, 733 (Tex. Crim. App. 1989) (equal protection claim pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Little v. State*, 758 S.W.2d 551, 563 (Tex. Crim. App. 1988) (admission of evidence implicating constitutional rights); *Crawford v. State*, 617 S.W.2d 925, 940 (Tex. Crim. App. 1980) (claim pursuant to *Adams v.Texas*, 448 U.S. 38 (1980), of denial to right to fair and impartial jury); *Darland v. State*, 582 S.W.2d 452, 456 (Tex. Crim. App. 1979) (Fourth Amendment claim); *Mendoza v. State*, 552 S.W.2d 444, 450 (Tex. Crim. App. 1977) (error in admission of testimony concerning proceedings revoking probation where defendant not represented by counsel); *Thompson v. State*, 537 S.W.2d 732, 735 (Tex. Crim. App. 1976) (admission of constitutionally invalid prior conviction); *Dunlap v. State*, 477 S.W.2d 605, 606 (Tex. Crim. App. 1971) (Sixth and Fourteenth Amendment claims regarding tainted in-court identification); *Ex parte Bagley*, 599 S.W.2d 332, 333 (Tex. Crim. App. 1974) (Fifth Amendment violation).

That the state's statutory procedural default rule constitutes an adequate and independent state ground is in no way undermined by the fundamental error exception. The state courts were not required to consider the merits of Selvage's Eighth Amendment claim before declining to apply the fundamental error exception. In addition, Selvage's apparent assertion that the state courts would properly find the error presented to be fundamental only raises an issue of state law which is not properly the subject of federal habeas review. Moreover, Selvage's assertion of fundamental error under state law is contrary to established state precedent and to the results actually reached by the court below.

II.

JUREK V. TEXAS, WOODSON V. NORTH CAROLINA AND LOCKETT V. OHIO PREDATED SELVAGE'S TRIAL, OTHER COUNSEL PERCEIVED THE CONSTITUTIONAL CLAIM PRIOR TO HIS TRIAL AND SELVAGE'S COUNSEL ACKNOWLEDGED HE KNEW OF THE BASIS FOR THE CLAIM. THEREFORE, SELVAGE'S *PENRY* CLAIM WAS NOT NOVEL AT THE TIME OF TRIAL AND SELVAGE CANNOT ESTABLISH CAUSE FOR HIS PROCEDURAL DEFAULT.

A. The Court should adhere to its consistent past pronouncements that futility will not constitute cause for a procedural default.

Under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny, the independent and adequate state

ground of procedural default ordinarily will bar federal habeas review of a state prisoner's constitutional claim unless he can show "cause" for the default and resulting "prejudice." *Dugger v. Adams*, ___ U.S. ___, ___, 109 S.Ct. 1211, 1215 (1989); *Harris v. Reed*, ___ U.S. ___, ___, 109 S.Ct. 1038, 1043 (1989). The Court's delineation of the contours and parameters of the procedural default doctrine has been guided by considerations of comity and finality and by the scope and costs of the collateral remedy of habeas corpus.[11] Accordingly, the meanings of "cause" and "prejudice" are to be informed by the policies of comity and finality. *Engle v. Isaac*, 456 U.S. 107, 135 (1982).

To establish cause for a procedural default, therefore, a habeas petitioner must generally show that "some objective factor external to the defense" impeded counsel's ability to comply with the state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Under this standard, the cause requirement is satisfied when "the factual or legal basis for a claim was not reasonably available to counsel." *Id.*, *citing Reed v. Ross*, 468 U.S. 1, 16 (1984). However, "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated the claim, the demands of comity and finality counsel against labelling alleged unawareness of the claim as cause for a procedural default." *Engle v. Isaac*, 456 U.S. at 134. For like reasons, counsel's alleged perception that presenting an available claim to the state courts would

[11]In *Engle v. Isaac*, 456 U.S. 107, 126-29 (1982), the Court recognized that collateral review undermines the policies of repose and finality of litigation by extending the "ordeal of trial;" detracts from the prominence society has attached to the criminal trial itself; prevents society from punishing unquestionable offenders because the passage of time renders the remedy of retrial impossible; and frustrates the good-faith efforts of state courts to implement and enforce constitutional rights.

be futile cannot constitute cause for a procedural default. *Id.* at 130 n.36.

Relying on language taken from *Reed v. Ross*, 468 U.S. at 17-18, Selvage urges that the perceived futility, renamed "foreclosure," of presenting his *Lockett*-type[12] claim to the Texas courts constitutes cause for his failure to preserve the claim as required by state law. Because *Reed* excused a procedural default where the legal basis for the claim was "reasonably" unavailable, he argues that his default of an available claim should be excused because, given his perception that state and federal relief was foreclosed, counsel's failure to object was "reasonable." *Reed* obviously does not stand for this proposition.

Reed addressed the broad issue of *novelty* as cause in the specific context of retroactive application of a constitutional principle that was not recognized at the time of the default. *Id.* at 17. The holding of *Reed* reflects the fundamental inequity of depriving a defendant of the benefit of retroactive application of a new constitutional rule representing a "clear break with the past," solely because his attorney failed to preserve the claim at a time when its legal basis was not available.[13] Moreover, as the Court later explained in *Smith v. Murray*, 477 U.S. 527, 537 (1986), a

[12]*Lockett v. Ohio*, 438 U.S. 586 (1978).

[13]Given the specific context in which *Reed* arose, the Court's analysis of novelty as cause for a procedural default logically drew upon the novelty formulation utilized in retroactivity cases. The Court's reliance on *United States v. Johnson*, 457 U.S. 537 (1982), suggests that only those "new" constitutional principles which represent a "clear break with the past" are sufficiently novel to excuse a procedural default. *See Griffith v. Kentucky*, ___ U.S. ___, ___, 107 S.Ct. 708, 714-16 (1987) (identifying "clear break" subset of "new" rules).

comparison of *Reed v. Ross* and *Engle v. Isaac* establishes that the novelty of a constitutional claim constitutes cause for a procedural default of that claim only in a narrow category of cases--those in which the legal basis for the claim was not available at all.

Counsel may possess the foresight to anticipate an as yet unrecognized constitutional principle, the acceptance of which would represent a "clear break with the past." Under these circumstances, however, there will almost never be an available legal foundation for counsel to rely upon. *Reed v. Ross*, 468 U.S. at 17. Only in these cases where the basis for a constitutional claim is not available at all, should counsel's perception that it would be futile to preserve or present possible error be sufficient to excuse his failure to do so.[14] The novelty exception already excuses such defaults, and there is, accordingly, no reason for the Court to revisit its proper rejection of futility as cause.

1. The meaning of "availability," in light of *Reed v. Ross* and *Engle v. Isaac*.

The novelty of a constitutional claim constitutes cause for a procedural default only in those cases where the legal basis for the claim was wholly unavailable. In *Engle v. Isaac* and *Reed v. Ross*, each habeas petitioner contended that the State's assignment of the burden of proof on certain affirmative defenses violated due process requirements by effectively shifting to the defense the burden of disproving an essential element of the offense charged. Thus, the only variable factors in the Court's analysis of cause were the timing of the

[14]As discussed *infra* at 44-50, this approach accords appropriate deference to the demands of comity and finality while recognizing the institutional needs of the legal system.

default and concurrent state of the law. The foundation for the legal claim in *Engle v. Isaac* was provided by *In re Winship*, 397 U.S. 358, 364 (1970), where the Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court explicitly acknowledged the connection between this due process principle and the allocation of the burden of proof by invalidating Maine's practice of requiring defendants to negate the element of malice by proving that they acted in the heat of passion arising from sudden provocation.

Although two of the *Engle* petitioners were tried in the period between *Winship* and *Mullaney*, the broad due process principle announced in *Winship* provided the tools by which their attorneys could reasonably extrapolate and raise the narrower issue which was directly addressed in *Mullaney*. The fact that other defense counsel had perceived and litigated the claim in the interim between *Winship* and *Mullaney* demonstrated the reasonable availability of the claim. Although lower courts were recognizing claims similar to the one subsequently adopted in *Mullaney*, this factor was not dispositive. The Court took care to note that "[e]ven those decisions rejecting the defendant's claim, of course, show that the issue had been perceived by other defendants and that it was a live one in the courts at the time." *Engle v. Isaac*, 446 U.S. at 133 n.41.

In contrast, Reed was tried in 1969, prior to *Winship*. At that time, *Leland v. Oregon*, 343 U.S. 790 (1952), had placed the stamp of approval on the long established and widely accepted practice of requiring the defendant to prove certain affirmative defenses by

holding that the states could require a defendant to prove insanity beyond a reasonable doubt, even though the existence of insanity also tended to negate the culpable mental state necessary to constitute the crime. *Leland* arguably sanctioned the practice of some states of allocating burdens of proof on affirmative defenses which negated essential elements of the offense, and *Winship* made clear that such practices would violate due process requirements. Because this Court had not announced the foundation principle for Reed's claim at the time of his default, and no other source provided a basis for asserting the claim, cause existed for his counsel's failure to preserve the error.

2. The legal basis for Selvage's claim was available at the time of the default.

Similarly, the Court's decisions in the 1976 death penalty cases clearly established the legal basis for Selvage's defaulted claim. In passing upon the constitutionality of various state responses to *Furman v. Georgia*, 408 U.S. 238 (1972), a plurality of the Court held that the Eighth Amendment requires an individualized capital-sentencing determination under a scheme that allows the sentencer to decline to impose the death penalty on the basis of mitigating evidence. For example, in holding the mandatory North Carolina death penalty scheme unconstitutional, the plurality stated:

> "A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. . . . A process which accords no significance

> to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. . . . [T]he Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Additionally, in gauging the constitutionality of the Texas capital sentencing scheme, the plurality noted:

> "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.
>
> Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances."

Jurek v. Texas, 428 U.S. 262, 271 (1976). *Woodson* and *Jurek* announced the broad Eighth Amendment principles which apply in the context of capital sentencing and provided the foundation for Selvage's defaulted claim in the same manner that *Winship* laid the basis for the *Engle* and *Reed* petitioners' claim.

With respect to the development and application of existing foundation principles, *Lockett v. Ohio*, 438 U.S. 586 (1978) is in Selvage's case the equivalent of *Mullaney v. Wilbur* in *Engle v. Isaac*. In *Lockett*, the Court was asked to directly determine "which facets of an offender or his offense it deemed 'relevant' in capital sentencing [and] what degree of consideration of 'relevant facets' it would require." 438 U.S. at 604. The *Lockett* plurality held that "relevant facets" are "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* With respect to the degree or type of consideration, the plurality concluded that a constitutionally acceptable capital-sentencing scheme must allow the sentencer to consider a "relevant facet" in a manner which can "affect the sentencing decision" in a mitigating fashion. *Id.* at 604, 608.

The Ohio statute at issue in *Lockett* required imposition of the death penalty in particular cases unless the defendant established at least one of three statutory mitigating factors. Facially, the statute provided for consideration of all of the "relevant facets" identified by the Court in *Lockett*: "the nature and circumstances of the offense and the history, character, and condition of the offender." *Lockett*, 438 U.S. at 607, 612-13. Moreover, the Ohio Supreme Court had held that the statutory mitigating circumstances were to be "liberally construed in favor of the accused." *Id.* at 608, *citing State v. Bell*, 48 Ohio St.2d 270, 281, 358 N.E.2d 556, 564 (1976). The statute did not, however, allow the *degree* of consideration required by the Constitution, because non-statutory mitigating factors could be given no effect in the sentencing decision except

insofar as they shed some light on the narrow circumstances delineated in the statute.[15]

Lockett, *Woodson* and *Jurek* provided Selvage's trial counsel with the tools for constructing the argument that this Court accepted in *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934 (1989). Selvage could have asserted that the Texas capital sentencing issues, as applied in his case, operated in the same unconstitutional fashion as the narrow statutory mitigating circumstances set forth in the Ohio statute and that the Texas special issues prevented his jury from considering specific evidence in a manner that would have mitigating effect on the sentencing determination. Indeed, this Court has held that *Lockett* dictated the rule which Penry sought and that *Jurek* imposed the obligation which *Penry* enforced. *Penry v. Lynaugh*, ___ U.S. at ___, 109 S.Ct. at 2947.

Moreover, at the time Selvage was tried, various *Lockett*-type claims had been raised in state court and reported in published opinions. *Quinones v. State*, 592 S.W.2d 933 (Tex. Crim. App.), *cert. denied*, 449 U.S. 893 (1980); *Adams v. State*, 577 S.W.2d 717 (Tex. Crim. App. 1979), *rev'd on other grounds sub nom.*

---

[15]*Lockett* hardly constituted blanket approval of the Texas capital-sentencing procedures. The plurality explicitly stated that none of the statutes approved in *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases "clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." *Lockett*, 438 U.S. at 607. Although the Court did not specifically mention the possibility that supplemental instructions might be necessary, under the Texas capital sentencing scheme, to allow the jury to consider specific types of mitigating evidence, that issue was irrelevant to its consideration of the Ohio death penalty statute at issue in *Lockett*.

Adams v. Texas, 448 U.S. 38 (1980); *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978); *King v. State*, 553 S.W.2d 105 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1088 (1978). Finally, in an affidavit offered by Selvage, trial counsel attested to an awareness at the time of trial that "the jury would not be able to consider [certain] evidence as a mitigating circumstance." *See* Appendix A at A-1.

B. The policies which give rise to the procedural default doctrine will be undermined if counsel's "reasonable" perception of futility is sufficient to constitute cause for a procedural default.

1. Institutional or systemic considerations are furthered by rejecting the concept of futility as cause.

Both the development of the law and the adversarial process depend upon attorneys who seek to extend the application of available legal principles to new, though arguably analogous, factual situations. A rule such as the one sought by Selvage, which removes what might be counsel's only incentive -- avoidance of a procedural default -- for performing this often difficult task would wreak havoc on the entire judicial system.

a. Evolution of the law

The evolution of constitutional principles depends on the disposition of specific cases. Certainly, the power of this Court, as ultimate expositor of constitutional law, is limited to the adjudication of actual cases and controversies. U.S. Const., art. III § 2; *Griffith v. Kentucky*, ___ U.S. at ___, 107 S.Ct. at 713.

The entire legal system thus benefits from, and indeed relies upon, the litigation of issues that are not firmly established. Collateral review is not now, and should not be, the primary vehicle for the development of the law.

It is true that a court which has not accepted the merits of an argument premised upon constitutional principles that have not yet been applied in a particular context might summarily reject subsequent efforts to assert the claim. The mere fact that the claim is being repeatedly advanced, however, might cause the court to rethink its earlier position: where competent and ethical counsel persistently rely on an available constitutional principle to attack some aspect of state proceedings, the court could well determine that its earlier analysis was ill considered, superficial or even erroneous. Moreover, with proper development, the facts of a particular case could serve to clarify the gist of the claim and, ultimately, persuade a court as to the merits of an argument previously rejected.

State capital-sentencing procedures are subjected to a high degree of federal judicial regulation. In this respect, as with the nature of the penalty, death is different. Given the large body of Eighth Amendment jurisprudence which has developed in a relatively short period of time, and the all too lengthy process by which a capital case wends from trial to direct appeal and federal habeas corpus, it would be difficult to ever show that a particular claim was asserted by dozens of defendants within a relatively short period of time. For the same reason, a specific claim, based upon an available Eighth Amendment principle, which has not been specifically rejected by this Court in an identical context, cannot be deemed totally foreclosed.

b. Adversary system

The adversary system would be undermined if the perceived futility of presenting an available claim constituted cause for the failure to do so. However reasonable the perception of futility might be, attorneys would have no incentive to raise, or factually develop, such claims. The result would ill serve both the legal system and criminal defendant.

By enforcing a procedural bar only in cases where the legal tools were available to construct the defaulted claim, the Court does not require counsel to "exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim." *See Engle v. Isaac*, 456 U.S. at 131. It is, however, entirely appropriate to charge counsel with the obligation of preserving and raising claims where the law has provided him with the tools for constructing the applicable argument.

Under this standard, a competent attorney will not necessarily litigate, or even perceive, every constitutional claim which is reasonably available. Nonetheless, the Court's formulation does not lend itself to inequitable results. An attorney is most likely to perceive and litigate a claim when the constitutional principle involved is likely to have a real effect in his client's case. Thus, those defendants who stand to receive the greatest benefit from the application of a constitutional principle are the most likely to make an objection in a timely fashion. *See Sykes*, 433 U.S. at 90 ("If a criminal defendant thinks that an action of the state court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.").

Moreover, one important function of trial counsel is to assist the court. Although the determination whether a particular jury instruction is proper does not rest on considerations of credibility and demeanor of witnesses, defendants and their attorneys nonetheless owe trial courts a duty to apprise them of the reasons why particular evidence was introduced and why special instructions are necessary to insure that the jury can appreciate its significance. Evidence believed by a defendant to be mitigating or to have mitigating value beyond the scope of the special issues might not be so perceived by the trial judge unless the defendant makes an objection on that basis. It is clear that certain, perhaps most, mitigating evidence can be given full consideration by the jury in answering the special punishment issues. *Franklin v. Lynaugh*, 487 U.S. ___, ___, 108 S.Ct. 2320, 2330 (1988). Potential errors in the charge stemming from misperceptions of the evidence can be corrected only with a timely objection by the parties. On the other hand, when the defendant raises no such objection, the court is justified in concluding that the defendant believed that the mitigating effect of his evidence was fully obvious to the jury and could readily be taken into account in answering the punishment issues. *Cf. Lowenfield v. Phelps*, ___ U.S ___,___, 108 S.Ct. 546, 552 (1988) (Silence by counsel indicative that prejudice to client not perceptible at time of trial).

c. Comity

Likewise, comity considerations are furthered by the limitation of the novelty exception to procedural defaults to unavailable or unknowable, as opposed to seemingly futile, constitutional claims. State courts are given respect by the federal courts because the states are primarily responsible for creating and enforcing criminal laws. *See Engle*, 456 U.S. at 128.

Of course, the states also serve as initial guardians of federal constitutional rights, *id.*, and federal habeas corpus is designed to provide an incentive for state courts to conscientiously and diligently perform this function. *Desist v. United States*, 394 U.S. 244, 262-63 (1969). If attorneys were obliged to raise and preserve only those constitutional claims that are well established and widely accepted in the factual situations involved in their cases, state courts would be relegated to the role of automatons which mechanically apply black letter law. Where courts become accustomed to such a limited role, as they surely would if counsel were absolved of any responsibility for litigating knowable claims, they will be less likely to appreciate the nuances which inhere in, and the policies which underlie, broad constitutional principles. Were the perception of futility to constitute cause for a procedural default, therefore, an important foundation of federalism would be undermined.

Thus, state courts are provided an opportunity to pass upon claims of constitutional error and, if necessary, to reconsider the propriety of their previous rejections of the claims. *Smith v. Murray*, 477 U.S. at 535. State courts admittedly do not always follow the spirit as well as the letter of the law, but the letter of the law is more readily discernible. A process which utilizes zealous advocates to persuade, and even educate state courts as to the spirit of the law will promote decisions in conformity with that spirit. By drawing the line at "availability," moreover, the Court has refused to allow state courts to be subjected to an inundation of claims whose basis would only be found in the fertile minds of imaginative counsel. The Court appropriately balanced and accommodated these weighty considerations when it concluded that "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that

claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default." *Engle*, 456 U.S. at 134. Selvage presents no valid reason for the Court to depart from this principle.

d. Finality

By requiring counsel to preserve all available constitutional claims at the time of trial, in accordance with state procedural rules, the interests of finality will be served. Factual issues bearing on the result of the trial will be developed at the time of trial. Because the passage of time results in the dispersion of witnesses and the fading of memories, the facts developed at the time of trial are likely to be more accurate than those developed thereafter. Moreover, society has marshalled its resources at the point of trial, to ensure decisions which are as accurate and reliable as humanly possible, and there is a substantial societal interest in having all relevant facts developed at this stage of the criminal proceedings.

The history of this case illustrates the necessity of ensuring that relevant facts are developed at the appropriate time. For example, Selvage propounds as mitigating evidence the results of a psychiatric examination which was conducted in 1988, some eight years after his trial and nine years after his commission of the capital murder. It is sheer speculation to state whether Selvage's mental condition in 1988 is the same or even similar to his mental condition at the time of trial and at the time he committed the capital offense.

If Selvage's argument is accepted, counsel will have no incentive to develop facts pertaining to capital sentencing at the time of trial, and the floodgates will

be open to factually meritless claims. Certain evidence may in the abstract possess mitigating qualities, particularly with the benefit of the twenty-twenty hindsight inherent in habeas litigation. Nonetheless, this evidence might not, in practice, be perceived by juries as mitigating so as to persuade them to act in a compassionate fashion. Competent and experienced trial counsel are in the best position to assess whether the abstract mitigating value of evidence is likely to find favor with local juries.

III.

SELVAGE'S PROCEDURAL DEFAULT IS NOT EXCUSED BECAUSE THE LACK OF SPECIAL INSTRUCTIONS IN SELVAGE'S CASE DID NOT RESULT IN A DEATH SENTENCE IMPOSED ON A PERSON WHO IS "ACTUALLY INNOCENT" OF SUCH A SENTENCE.

There being no good cause for his procedural default, Selvage next urges that the imposition of a procedural default in his case would result in a fundamental miscarriage of justice. He asserts that, this Court's established precedent notwithstanding, *see Dugger v. Adams*, ___ U.S. at ___ n.6, 108 S.Ct. at 1217 n.6; *Smith v. Murray*, 477 U.S. at 537-39, the requirement of a showing that a constitutional error probably resulted in the conviction of a person who is actually innocent to establish a fundamental miscarriage of justice should be inapplicable here because the alleged *Penry* error in his case deprived him of a "basic trial process." Alternatively, Selvage argues that the alleged *Penry* error in his case probably resulted in the imposition of a death sentence to a person who is undeserving of it.

A. Selvage's proposal that a "fundamental miscarriage of justice" should be unrelated to his actual innocence is foreclosed by well established precedent of this Court and, if adopted, would eviscerate the procedural default doctrine.

From the inception of the procedural default doctrine, the Court has recognized that the principles of comity and finality that underlie the doctrine must not intrude on the federal courts' duty to prevent miscarriages of justice. In *Wainwright v. Sykes*, 433 U.S. at 90-91, the Court recognized the inherent right of a federal court to correct miscarriages of justice and that the "cause and prejudice" rule of *Francis v. Henderson*, 425 U.S. 536 (1976), would not prevent the federal courts from so acting. The Court declined to elaborate on what constituted a miscarriage of justice. *Sykes*, 433 U.S. at 91.

In *Engle v. Isaac*, the Court reiterated its holding in *Sykes*, rejecting a claim that the procedural default doctrine should be limited to constitutional claims that do not affect the truth-finding function of the trial. *Engle*, 456 U.S. at 129. Moreover, while again recognizing that the principles of comity and finality underlying the procedural default doctrine "must yield to the imperative of correcting a fundamentally unjust incarceration," the Court felt confident that victims of a "fundamental miscarriage of justice" will meet the cause and prejudice standard of *Sykes*. *Id.* at 135. The Court again did not define the parameters of a miscarriage of justice.

In *United States v. Frady*, 456 U.S. 152 (1982), the Court defined the degree of prejudice necessary to

excuse a procedural default. Recognizing the rule of *Henderson v. Kibbe*, 431 U.S. 145 (1977), limiting habeas relief to errors of greater prejudice to petitioners than "plain error," the Court held the prejudice prong of *Sykes* to be satisfied only upon a showing that the errors worked to a petitioner's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *Frady*, 456 U.S. at 170.

Murray v. Carrier, 477 U.S. 478 (1986), was a case involving a defaulted *Brady v. Maryland*, 373 U.S. 83 (1963), claim. Noting its language in *Engle*, the Court reiterated that the federal courts will look beyond principles of comity and finality to redress miscarriages of justice, and that, for the most part, victims of a fundamental miscarriage of justice will meet the cause and prejudice standard of *Sykes*. *Carrier*, 477 U.S. at 495-96. Thus, the Court rejected the dissent's proposal that the requirement of cause be dispensed with in favor of an inquiry into whether there had been a "manifest injustice" or denial of "fundamental fairness," involving either a federal right of "fundamental importance" or a violation of a right that "calls into question the accuracy of ... guilt." *Id.* at 492-95. The Court noted that this was nothing more than a restatement of the prejudice requirement of *Sykes*. *Id.* at 493-95.

However, the Court recognized that the cause and prejudice standard would not always prevent fundamental miscarriages of justice:

> Accordingly, we think that *in an extraordinary case*, where a constitutional violation has *probably resulted in the conviction of one who is actually innocent*, a federal habeas court may grant the writ in the

> absence of a showing of cause for the procedural default.

Id. at 496 (emphasis added). Thus, the Court for the first time gave definition to the concept of a fundamental miscarriage of justice: conviction of a person who is probably actually innocent.

The *Carrier* Court further noted that the right to assert claims of ineffective assistance of counsel further operates as a safeguard against miscarriages of justice and that the presence of such a safeguard assists in determining the standard governing the exercise of discretion in reviewing procedurally defaulted claims. *Id.* at 496. The Court, noting Carrier's failure to assert any impediment preventing counsel from raising the *Brady* claim in state court and his disavowing any claim of ineffective assistance of counsel, then concluded that Carrier's claim must be dismissed for failure to establish cause under *Sykes* unless the *Brady* material established his actual innocence. *Id.* at 497.

In a case decided the same day as *Carrier*, the Court revisited the issue of miscarriage of justice, this time in the context of capital sentencing. *Smith v. Murray*, 477 U.S. 527 (1986). In *Smith*, the petitioner failed to comply with state procedure, resulting in his default of a claim of the improper admission of psychiatric testimony at the punishment phase of trial, in violation of this Court's rule in *Estelle v. Smith*, 451 U.S. 454 (1981). Having found that the *Estelle v. Smith* claim was deliberately abandoned by appellate counsel due to perceived futility and that such a claim was not novel, the Court held that the petitioner failed to establish cause for his default. *Smith v. Murray*, 477 U.S. at 533-37. Turning to the question of miscarriage of justice, the Court, acknowledging difficulty in translating actual innocence in the context of capital

sentencing, found that the error did not produce false facts nor did it preclude the development of true facts. Therefore, the Court concluded that the case did not present a risk of a fundamental miscarriage of justice. *Id.* at 537-38.[16] The Court did not attempt to define the concept of actual innocence in a capital sentencing context.

The Court's final foray into the question of a fundamental miscarriage of justice exception to the procedural default doctrine occurred in *Dugger v. Adams*, ___ U.S. ___, 109 S.Ct. 1211 (1989). In that case, the petitioner failed to raise on appeal a claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), relating to the trial judge's misinforming the jury on its responsibilities under Florida law, thus resulting in a procedural default. Because the essence of a *Caldwell* claim is that the jury is misinformed of its duties in violation of state law, a failure to object under state law would support the imposition of a procedural default even though *Caldwell* had not been decided at the time of trial or appeal. *Dugger v. Adams*, ___ U.S. at ___, 109 S.Ct. at 1215-18. Having failed to establish cause for his default, Adams asserted that his procedural default should be excused because the *Caldwell* error resulted in a fundamental miscarriage of justice. The Court disagreed. While again declining to define actual innocence, the Court held that the fact that the trial judge found an equal number of aggravating and mitigating circumstances did not cause the failure to

[16]The Court in *Smith v. Murray* did not, as implied by Selvage, hold that a finding that false facts were admitted or true facts were omitted would end the inquiry into whether there has been a fundamental miscarriage of justice. The most that can be implied from the Court's language is that the Court would then look at the entire factual posture, excluding the false facts and including the true facts to determine whether the petitioner has demonstrated his actual innocence of the death penalty.

properly instruct the jury on its responsibility under state law to constitute a fundamental miscarriage of justice. *Dugger v. Adams*, ___ U.S. at ___ n.6, 109 S.Ct. at 1217 n.6. The Court further rejected the dissent's assertion that a miscarriage of justice occurs when a petitioner makes a substantial claim that a constitutional violation undermined the accuracy of the sentencing determination. The Court stated:

> We reject this overbroad rule. Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which the error results in a fundamental miscarriage of justice, the "extraordinary case," *Carrier, supra*, 477 U.S. at 496, into an all too ordinary one.

Dugger v. Adams, ___ U.S. at ___ n.6, 109 S.Ct. at 1217 n.6.

Selvage, like the dissenting Justices in *Carrier*, *Smith* and *Dugger v. Adams*, attempts to carve an exception to the actual innocence requirement to demonstrate a miscarriage of justice. He asserts that claims of constitutional errors which deprive a defendant of a "basic trial process," *see Rose v. Clark*, 478 U.S. 570, 578 n.6 (1986), should constitute a miscarriage of justice independent of its effect on his actual innocence. Review of Selvage's claim, however, reveals that it is devoid of factual and legal support.

Selvage's claim that the failure of the trial court to *sua sponte* instruct the jury on its consideration of

mitigating evidence acted to deprive him of a "basic trial process" ignores state law. Texas provides a process for requesting special instructions to be added to a court's charge or to otherwise object to the charge. Tex. Code Crim. Proc. Ann. arts. 36.14, 36.15 (Vernon Supp. 1989). Selvage points to no ruling of the Court of Criminal Appeals holding a trial court's giving of such an instruction to be erroneous, and none exists. Likewise, Selvage cannot contend that state evidentiary rules preclude the admission of the evidence he now proffers. Indeed, the Court of Criminal Appeals will not hesitate to reverse a case where mitigating evidence is excluded. *See, e.g., Burns v. State*, 761 S.W.2d 353 (Tex. Crim. App. 1988). Moreover, if the trial court denied a special instruction and counsel believed that had the effect of excluding evidence, he would be free to perfect a bill of exception demonstrating the evidence he felt precluded from presenting. *See* Tex. R. App. P. 52 (Vernon Supp. 1989).[17] There clearly were numerous tools at Selvage's disposal to mount his defense.[18]

---

[17]Indeed, in support of his objection to the imposition of the death sentence on the basis that non-triggermen were exempt from such punishment under state law, Selvage perfected a bill of exception consisting of testimony by State Senator Craig Washington regarding the legislative history and legislative intent regarding execution of non-triggermen in the adoption of Texas' capital sentencing procedures.

[18]Selvage's attempt to find succor in Judge Henry Friendly's teachings is equally unavailing. Judge Friendly would not require a showing of innocence where the state failed to provide proper procedure for making a defense at trial and on appeal. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, U.Chi. L. Rev. 142, 152-53 (1970). As an example, Judge Friendly cites *Jackson v. Denno*, 378 U.S. 368 (1964), a case addressing a complete absence of state procedures to test the voluntariness of a confession. Here, by contrast, adequate state procedures were available to Selvage, but he elected not to avail himself of them.

Moreover, Selvage's attempt to portray *Penry* error as a denial of a basic trial process is unavailing. The cases where harm is presumed, as noted in *Rose v. Clark*, 478 U.S. at 577-78, 578 n.6, involve such basic rights as the right to counsel, the right to trial before an impartial judge and jury, the right to a jury trial and the right not to bear witness against oneself by the use of a coerced confession. *See Satterwhite v. Texas*, ___ U.S. ___, ___, 108 S.Ct. 1792, 1797 (1988). To conclude that *Penry* error is *per se* harmful is to ignore this Court's holding in *Franklin v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2320 (1988), that the denial of the instructions Selvage now deems "basic trial process" did not preclude consideration of mitigating evidence. It is clear that the potential for harm to Selvage arising from his alleged *Penry* violation is no greater than that faced by the petitioner in *Carrier*, where the prosecutor allegedly withheld exculpatory evidence, items that would be crucial in formulating a defense. Yet, in *Carrier*, the court concluded that the petitioner would have to demonstrate actual innocence to excuse his default of his *Brady* claim. Selvage should shoulder no less a burden.

Stripped of its embellishments, Selvage's claim is that, although state law provided vehicles for consideration of mitigating evidence that had relevance beyond the special issues and for the preservation of his alleged *Lockett-Penry* error if the state court did not provide adequate punishment phase instructions, Selvage nonetheless did not comply with state procedure because he believed it would be futile. To elevate this to the level of a fundamental miscarriage of justice would be to allow a petitioner to manufacture an exception to the procedural default doctrine so large that it would, at the very least, effectively overrule *Engle v. Isaac* and, more probably, eviscerate the doctrine entirely.

B. Because Selvage does not demonstrate the existence at the time of trial of mitigating evidence so compelling that no rational juror could have concluded that a death sentence was appropriate, he fails to demonstrate actual innocence of the death sentence sufficient to excuse his procedural default.

Having determined that a fundamental miscarriage of justice may be established by Selvage only if he can make a showing of actual innocence of a death sentence, the task remains to determine what constitutes actual innocence in a capital sentencing context. At the outset, certain undeniable axioms must be stated. First, the death penalty is a constitutionally appropriate sentence for persons who commit intentional homicides during the course of committing other felonies. *Jurek v. Texas*, 428 U.S. at 270-71. Selvage, whose guilt of murder during the course of committing robbery was established by overwhelming evidence, cannot claim that because of the alleged *Penry* error he is probably innocent of his death sentence in this regard.

Second, the death penalty is a constitutionally appropriate sentence for a person who is a major participant in a felony and who displays a reckless indifference to human life. *Tison v. Arizona*, 481 U.S. ___, ___, 107 S.Ct. 1676, 1688 (1987). Selvage, who planned the robbery of Ventura's Jewelry with Wilbur Kelly, who entered the store armed with a loaded pistol and who fired several shots in effectuating an escape, cannot claim that because of the alleged *Penry* error he is probably innocent of the death sentence in this regard.

Third, it is constitutionally permissible to impose a death sentence on a person who, by his actions, intends or contemplates that human life will be taken. *Enmund v. Florida*, 458 U.S. 782 (1982). Nothing in Selvage's recently related "evidence" challenges the jury's determination beyond a reasonable doubt that Selvage's actions were committed deliberately and with the reasonable expectation that death would result. Selvage thus cannot claim that because of the alleged *Penry* error in his case, he is probably innocent of the death sentence in this regard.

Fourth, it is constitutionally permissible to impose a death sentence on a person who was sixteen years of age or greater at the time of his offense. *Stanford v. Kentucky*, ___ U.S. ___, 109 S.Ct. 2969 (1989). Selvage, who was 28 at the time of his crime, cannot claim that because of the alleged *Penry* error he is actually innocent of the death sentence in this regard.

Fifth, it is constitutionally permissible for a sentencer to base its decision to impose a death sentence on a determination that a defendant will probably commit future acts of violence that will constitute a continuing threat to society. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Barefoot v. Estelle*, 463 U.S. 880 (1983). Evidence of Selvage's future dangerousness was overwhelming, including two prior felony convictions, one escape attempt and a prior capital murder. While Selvage's recently related "evidence" does somewhat relate to his future dangerousness, it largely duplicates the evidence offered at trial through his sister and Dr. Garcia. Indeed, Selvage asserts that this newly related material would have helped establish his future dangerousness. Hence, Selvage cannot complain that, because of the alleged *Penry* error in his case, he is

probably innocent of the death sentence insofar as it is based on his future dangerousness. .

Finally, the mere fact that a defendant's background or character may have mitigating aspects or that there are factors that mitigate his culpability for his crime does not establish his actual innocence of a death sentence. While Selvage asserts that the alleged *Penry* error in his case caused counsel to forego investigation and presentation of psychiatric evidence such as that related by Dr. Merikangas, he simply cannot legitimately contend that this evidence, when contrasted with the overwhelming evidence of aggravation, renders him actually innocent of a death sentence.

Thus, it is apparent that a defendant can establish actual innocence of the death penalty by establishing that he is a member of a class for whom a death sentence is not available as a matter of constitutional or state law. Therefore, if a petitioner could establish that he was not within a sufficiently narrowed class of offenders to meet constitutional standards, he would be actually innocent of the death sentence. Likewise, if a petitioner could establish that he fit within the rules of *Tison* and *Enmund*, or *Thompson v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687 (1988), or that he was actually innocent of one of Texas' special issues, he would be actually innocent of a death sentence. Selvage clearly has not made such a showing, and thus cannot be considered actually innocent of the death sentence in this regard.

The problem this Court faces is the manner in which it views evidence that mitigates against a death sentence but does not compel a sentence less than death as a matter of law. The state fully concurs with *Amicus* Criminal Justice Legal Foundation's position

that, given the potential for speculation inherent in an inquiry into actual innocence arising from such mitigating evidence, the analysis should end with a determination that the petitioner does not fall within an exempt class. *See* Brief of *Amicus* CJLF at 25-30.[19] However, should the Court not agree with this position, it then must devise a mechanism for determining actual innocence in this context.

The Court has made clear that the fundamental miscarriage of justice exception to procedural defaults is limited to "extraordinary cases." To ensure that the case of a fundamental miscarriage of justice is the "extraordinary case," a finding of actual innocence must necessarily be a greater burden than either the requirement of cause or prejudice in *Sykes* or any of the other safeguards designed to prevent fundamentally unjust convictions. The right to effective assistance of counsel acts as a safeguard to prevent miscarriages of justice, and a valid claim of ineffective assistance of counsel will constitute cause for a procedural default. *Carrier*, 477 U.S. at 488-89, 496. To sustain a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), a petitioner must establish a probability of a different result sufficient to "undermine confidence in the outcome." If counsel's errors arose in the context of capital sentencing, a petitioner claiming ineffective assistance of counsel, which addresses the fundamental fairness of a state trial, *Id.* at 697, must demonstrate that, but for

---

[19]*Amicus'* position was informed by an apparently well founded concern of judicial overreaching in determining actual innocence of a death sentence. *See* Brief of *Amicus* CJLF at 30 n.15. While the state is confident that it can devise a rule that will minimize, if not eliminate, such overreaching, adoption of Selvage's proposed rule that the defendant is "undeserving" of the death sentence would not serve this end. Such a highly subjective rule would invariably invite such overreaching.

counsel's errors, the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 694-95. Because a demonstration of a fundamental miscarriage of justice is necessarily greater than that necessary to establish a denial of fundamental fairness, *Murray v. Carrier*, 477 U.S. at 493-96, probable actual innocence of a death sentence must necessarily require a greater showing of prejudice than that required to establish prejudice under *Strickland*. Moreover, to allow the same or a lesser showing of prejudice to establish a fundamental miscarriage of justice would effectively undermine the cause and prejudice test and cause the "extraordinary case" to become an "all too ordinary one." *Dugger v. Adams*, ___ U.S. at ___ n.6, 109 S.Ct. at 1217 n.6.[20]

The Court has, of course, adopted a rule designed to prevent unjust incarcerations based upon insufficient evidence. *Jackson v. Virginia*, 443 U.S. 307 (1979). Adoption and modification of the *Jackson* standard to reflect the fact that the burden of production and persuasion of mitigating evidence may properly be placed on the defendant, *Patterson v. New York*, 432 U.S. 192, 201-02 (1977), would provide an appropriate safeguard to prevent a miscarriage of justice. Hence, for a petitioner to establish his actual innocence of a death sentence, he would have to demonstrate the existence at the time of trial of mitigating evidence so compelling that no rational factfinder, properly instructed and viewing all of the

[20]Indeed, the Court in *Dugger v. Adams*, ___ U.S. at ___ n.6, 109 S.Ct. at 1217 n.6, recognized that the fact that confidence in the sentencing outcome may be undermined--the consideration underlying *Strickland* prejudice--is insufficient to demonstrate a fundamental miscarriage of justice.

reliable evidence in existence at the time of trial,[21] could have concluded that a death sentence was appropriate.

Selvage does not meet this standard. While he goes to great lengths to minimize his involvement in the murder of Albert Garza, the fact remains that Selvage planned the robbery with Kelly, Selvage entered the store prepared to use lethal force with a loaded pistol, and Selvage in fact used lethal force. Rather than support a claim that Selvage lacked an intent to kill, the most logical inference from the evidence is that, at best, Kelly merely beat him to the kill.[22]

The psychiatric evidence Selvage now proffers is even less compelling. The reliability of Dr. Merikangas' findings, insofar as they relate to psychological disorders that existed at the time of trial, is highly suspect. The mere fact that the evaluation occurred nine years after the fact substantially reduces its reliability. Moreover, Merikangas' observations of bizarre behavior are completely at odds with trial counsel's observations of Selvage upon arrest, in preparing for trial and at trial, wherein he was lucid, coherent, appropriately responsive, soft spoken and

[21]Judge Friendly makes clear that all evidence in existence at the time of trial, even if it was excluded as illegally obtained or became available only after trial, with due regard to any unreliability in the evidence, should be considered in determining actual innocence. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi. L. Rev. at 160.

[22]It is by no means a foregone conclusion that Selvage did not kill the deceased. As the prosecutor made clear in his punishment argument, there is substantial circumstantial evidence indicating Selvage was the triggerman (R VII 2969-70).

well mannered and possessing good memory of events. *See* attached Appendix B at B-1-4. Further, review of Selvage's two confessions (R VIII 3038-39) and Selvage's testimony during pretrial motions (R II 775-837) confirms counsel's observations. Thus, the possibility of the severe psychosis which Selvage now complains existed at the time of trial seems remote. Whatever mitigating value evidence of Selvage's 1980 mental condition would have possessed, it can hardly have been of such a compelling nature, when compared with the overwhelming evidence in aggravation, to mandate a life sentence.

In sum, it is clear that Selvage cannot make a showing that the alleged *Penry* error precluded consideration of evidence establishing his innocence of his death sentence, either by showing he is in a class for which a death sentence is unavailable or by demonstrating the existence of compelling mitigation that would not allow any rational factfinders to conclude death was an appropriate sentence. Selvage's procedural default is thus not excused.

CONCLUSION

For the above reasons, the state respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

LOU McCREARY
Executive Assistant
Attorney General for Litigation

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

DANA E. PARKER
Assistant Attorney General

ANDREA L. MARCH
Assistant Attorney General

DON MOREHART
Assistant Attorney General

ROBERT S. WALT
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

APPENDIX A

January 19, 1988, Affidavit of John Emmett Crow

APPENDIX A

AFFIDAVIT OF JOHN EMMETT CROW

County of Harris)
) **ss:**
State of Texas)

JOHN EMMETT CROW, being duly sworn according to law, deposes and says:

1. I am an attorney at law duly licensed to practice my profession in the State of Texas. My address is 1027 South Main, Suite B, Pasadena, Texas 77506.

2. I was one of the defense attorneys who represented John Henry Selvage in Case No. 305,495 in the 230th District Court of Harris County, Texas, in which Mr. Selvage was convicted of capital murder and sentenced to death. I have been asked to provide this affidavit in relation to my representation of Mr. Selvage.

3. The question which I have been asked concerns the absence of any evidence presented by the defense in the penalty phase of the trial with respect to Mr. Selvage's mental and emotional impairment.

(a) My co-counsel and I decided early in our representation of Mr. Selvage that we would not present evidence of mental illness in the penalty phase of the trial, no matter how strong it was, because we believed the jury would not be able to consider such evidence as a mitigating circumstance.

(b) By the time this case was tried in early 1980, the State's use of Dr. Ernest Grigson to show that a capital defendant would likely be dangerous in the future was well known. Whatever the disorder suffered by a capital defendant, from antisocial personal disorder to major mental illnesses like schizophrenia, Dr. Grigson was able to persuade juries that *any disorder increased the likelihood* that the defendant would be dangerous in the future. Once the jury found that mental illness increased the likelihood of the defendant's future dangerousness, the jury was obliged to answer Special Issue 2 "yes." Through the use of witnesses like Dr. Grigson, therefore, the State was able to convert otherwise mitigating evidence like mental illness into evidence in support of an aggravating circumstance.

(c) Since the jury was able to consider only one other question in Mr. Selvage's case -- the deliberateness question posed by Special Issue 1 -- we were convinced that even if we did present evidence of mental illness, with the problems attendant to Special Issue 2, the jury would still have no meaningful way of considering the mental illness evidence as a mitigating circumstance. The jury could quite readily find that the homicide was sufficiently deliberate to answer Special Issue 1 "yes" even if Mr. Selvage did suffer from a severe mental illness. In our experience it was rare for jurors to find mental illness so incapacitating as to interfere with a defendant's ability to commit deliberate

acts. And if the jury answered Special Issue 1 "yes," having already answered Special Issue 2 "yes," the death sentence was mandatory.

(d) Given these considerations, we decided that Mr. Selvage's interests could not be served by investigating and presenting evidence of any mental illness from which he suffered. On the one hand, the jury could be forced to treat such evidence as aggravating, and on the other, the jury was extremely unlikely to consider mental illness as negating the deliberateness of the crime. The jury was given no third option under the Texas statute -- to consider whether the evidence of mental illness was substantial enough as a mitigating circumstance to call for a life sentence, even in the face of the affirmative findings on the special issues. Thus, we could conceive of no way that such evidence could help Mr. Selvage.

4. If, on the other hand, Texas had offered such a third option to the jury, our strategy would have been different. At the very least, we would have investigated Mr. Selvage's mental health history. And if we had found evidence of serious mental illness, we likely would have presented it. Even though, in such circumstances, evidence of mental illness might still have increased the possibility that the jury would find that Mr. Selvage posed a threat of future violence, the evidence could have served as an even stronger countervailing factor -- as a reason to impose life that was weightier than the reason to impose death because of the threat of future dangerousness. Without investigation, we could not have known if such

evidence was available to Mr. Selvage -- so at a minimum, we would have investigated this matter.

/S/
JOHN EMMETT CROW

Subscribed and sworn before me
this 19th day of January, 1988.

/S/
NOTARY PUBLIC

My Commission Expires: 10-13-90

APPENDIX B

February 16, 1988,
Affidavit of John Emmett Crow

APPENDIX B

NO. 305495-B

EX PARTE	**IN THE 230th DISTRICT COURT OF**
JOHN HENRY SELVAGE, Applicant	**HARRIS COUNTY, TEXAS**

AFFIDAVIT OF JOHN E. CROW

My name is John E. Crow. I am an attorney licensed to practice law in the State of Texas, having been so licensed since 1973. My business address is 1207 South Main, Suite B, Pasadena, Texas.

Dennis Kelly and I were appointed by the Honorable Joe Kegans to represent John Henry Selvage in the primary case. Although the docket sheet reflects that Mr. Kelly and I were appointed as counsel much later, we were actually appointed prior to Mr. Selvage's arrest on August 9, 1979 in New Orleans, Louisiana.

On or about August 10, 1979, I received a telephone call from the coordinator of Judge Kegans' court informing me that my client had been arrested in New Orleans. I immediately sent three telegrams to New Orleans, one to the parish Sheriff, one to the District Attorney and one to the officer in charge of the investigation. Additionally, I left by plane for New Orleans on August 10 and arrived at the New Orleans jail sometime around 2:00 p.m. Once there, I introduced myself to Mr. Selvage and explained that I had been appointed by the court to defend him against the capital murder charge that had been filed against him. Additionally, I advised him not to make any

statement to the police. Before I left to pick up Mr. Kelly at the airport, I gave Mr. Selvage my business card. Mr. Selvage appeared lucid and coherent. He indicated that he understood the charges against him and responded appropriately to the questions I asked.

Upon my return with Mr. Kelly a few hours later, we interviewed our client more thoroughly concerning commission of the offense and the circumstances surrounding his arrest. We found Mr. Selvage to be soft-spoken and well-mannered. In a coherent manner he recounted the details of the capital offense, as well as the manner in which his two confessions had been taken. We both found that Mr. Selvage had a good memory in terms of remembering the details of the offense.

In addition to these initial interviews, both Dennis Kelly and I visited with Mr. Selvage on numerous occasions. At no time during the course of the investigation, trial preparation or trial itself did Mr. Selvage give any indication that he was anything other than sane at the time he committed the offense and competent to stand trial. He was able to relate details of the offense and consistently took the position that Wilbur Kelly had been the triggerman in the jewelry store robbery. The confessions that he gave, although not admitted into evidence, reflect his ability to communicate his ideas effectively. This was also evident when he took the witness stand in the pre-trial hearing conducted before the court. Additionally, Mr. Selvage communicated freely with Dennis Kelly and me during the course of the trial. He often took notes during testimony and frequently asked Mr. Kelly and me pertinent questions. He also provided us with considerable input and useful information, particularly in the voir dire phase of the trial.

In connection with our investigation, Mr. Kelly and I visited the defendant's home in New Orleans. There, we sat down with Mr. Selvage's family in an attempt to learn more about our client. We learned, among other things, that John came from a very close family and that he had been raised in a fairly stable family environment. We also discovered that he had been an honor student in high school. When asked about prior psychiatric treatment or mental problems, the family indicated there had been none. Although they expressed concern about a change in John's behavior following his military discharge, they attributed the change to his problems with hard drug addiction. This information was consistent with information later revealed to me by the prosecutor, Andy Tobias, in connection with a *Brady* motion. Although I was unable to inspect the military records because of certain disclosure prohibitions, Mr. Tobias represented that the military records he possessed reflected my client's medical discharge based upon his use of alcohol and/or drugs. Mr. Tobias did tender these records to the court and I feel confident that had they reflected any evidence of mental disease or defect, the court would have informed me of that. In the course of my preparation I also asked Mr. Selvage whether he had ever had psychological problems or suffered from any mental illness. While I do not recall his exact response, I feel certain that his response, coupled with my personal observations and the information that I had gathered, foreclosed any potential insanity defense.

I was very much aware, however, that Mr. Selvage suffered from a serious heroin habit and was probably under the influence of drugs at the time he committed the offense. I did not, however, believe that John suffered from any disease of mind or mental defect that would have interfered with either his ability

to know that his conduct was wrong or his ability to conform his conduct to the requirements of the law. Had I believed that, there is no doubt that I would have requested a psychiatric examination of my client, regardless of my perceptions concerning trial strategy and the presentation of psychological evidence as a mitigating factor. In my professional opinion, I saw no need to have Mr. Selvage undergo a psychiatric exam, particularly since voluntary intoxication and diminished capacity were not and are not available defenses under Texas law.

After reviewing the evidence against our client, Mr. Kelly and I had numerous discussions concerning defense strategy. We determined that our best strategy was a two-prong attack on the State's evidence. First, we hoped to successfully impeach the identification testimony of the State's witnesses and argue that the State had failed to prove beyond a reasonable doubt that John Selvage had even been present at the jewelry store robbery. We ultimately attempted to show that someone else, possibly Eugene Wadis, had been present with co-defendant Wilbur Kelly and Brenda Joseph. Secondly, we hoped to prove that no one ever saw a gun in Mr. Selvage's hand during the commission of the robbery. This position dove-tailed with our legal argument challenging the sufficiency of the evidence to support an affirmative answer to special issue number one. Since there was no evidence that John Selvage was the actual triggerman in the robbery, and since the court refused to submit a special issue concerning our client's participation as triggerman, we considered the imposition of the death penalty to be both immoral and unconstitutional.

It was also part of our strategy not to present psychological testimony concerning Mr. Selvage's drug problem and drug-related mental condition. We reasonably believed that such evidence would function

as a "double-edged sworn." While the jury might view my client's drug addiction and attendant emotional problems as mitigating circumstances, it was equally plausible that they could perceive them as aggravating factors that enhanced the likelihood of future dangerousness. Too, I was convinced that a psychiatric exam would not provide us with any benefit, i.e. either an insanity defense or a finding of incompetence. In my opinion, the benefits of a psychiatric evaluation were far outweighed by the potentially harmful evidence said evaluation might produce -- evidence the State might find useful at punishment either in their case-in-chief or in rebuttal. In that regard, we chose to submit evidence of my client's problem to the jury through a less problematic method. In the punishment phase of the trial the defense called two witnesses. The first, Mr. Selvage's sister, testified concerning John's family background and his accomplishments as a young adult. She also explained how John's addiction to heroin had changed him. Our second witness, Dr. Jose Garcia, testified concerning the rehabilitation programs and counseling services available to inmates, as well as the psychological treatment program for drug addiction. We hoped that this evidence would provide the jury with some basis for believing that John Selvage, with proper treatment and therapy in the Texas Department of Corrections, would not constitute a continuing threat to society. Our final arguments, I believe, reflected our strategy to obtain negative answers to the special issues based on our position that John Selvage had never shot anyone and that he could be rehabilitated within the confines of the penitentiary.

/S/

JOHN E. CROW

THE STATE OF TEXAS

COUNTY OF HARRIS

Before me, the undersigned authority, on this day personally appeared John E. Crow, who being personally known to be to be a credible person, and who, after being duly sworn on oath by me deposes and acknowledges the following:

"I have personal knowledge of the above and foregoing facts and they are true and correct."

Subscribed and sworn to before me this 16th day of February, 1988.

/s/
NOTARY PUBLIC AND AND FOR
THE STATE OF TEXAS

Printed Name

Commission Expiration

Supreme Court, U.S.
FILED
JAN 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-6700 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN HENRY SELVAGE,

Petitioner,

v.

JAMES A. LYNAUGH,
Director, Texas Department of Corrections

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

DAVID CUNNINGHAM
1927 Norfolk
Houston, TX 77098
(713) 520-7701

JULIUS L. CHAMBERS
*RICHARD H. BURR, III
GEORGE H. KENDALL
STEVEN W. HAWKINS
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 219-1900

Counsel for Petitioner

**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

HIPP

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

I. THERE IS NO LEGITIMATE DISPUTE THAT THE ADEQUACY AND INDEPENDENCE OF TEXAS' PROCEDURAL DEFAULT RULE, THROUGH ITS CHAMBERS EXCEPTION, IS PROPERLY BEFORE THE COURT AND THAT THE APPLICATION OF THE RULE EXCUSES MR. SELVAGE'S DEFAULT 1

A. The Chambers rule governs this case 2

B. There is no independent basis for the ruling below 7

II. BY IGNORING THE DIFFERENCE BETWEEN "PERCEIVED FUTILITY" AND LEGAL FORECLOSURE, THE STATE AND ITS AMICUS CURIAE SEEK TO HAVE THIS COURT PROPOUND A RULE THAT WOULD PROVE SEVERELY DETRIMENTAL TO BOTH STATE COURTS AND CRIMINAL DEFENDANTS. 10

III. MR SELVAGE HAS DEMONSTRATED THAT THE PENRY ERROR IN HIS TRIAL INVOLVES A FUNDAMENTAL MISCARRIAGE OF JUSTICE . . . 18

A. Penry Error Is A Denial Of Basic Trial Process 18

B. The Standards Proposed By The State For The "Innocence" Determination Are Contrary To The Standard Dictated By Murray v. Carrier 23

C. Had The Jury Been Able To Consider All The Relevant Mitigating Evidence, It Probably Would Not Have Imposed Death 28

Table of Authorities

CASES Pages

Ake v. Oklahoma, 470 U.S. 68 (1985) . .7

California v. Ramos, 463 U.S. 992 (1983) 19, 27

Ex parte Chambers, 688 S.W.2d 483 (Tex. Cr. App. 1984) . . . . . passim

Doyle v. Ohio, 426 U.S. 610 (1976) . . 9

Eddings v. Oklahoma, 455 U.S. 104 (1982) 27,30

Engle v. Isaac, 456 U.S. 107 (1982) 11, 17

Enmund v. Florida, 458 U.S. 782 (1982) 24

Ford v. Wainwright, 477 U.S. 399 (1986) 24

Frank v. Mangum, 237 U.S. 309 (1915) 21

Franklin v. Lynaugh, 101 L. Ed. 2d 155 (1988) 3

Greer v. Miller, 483 U.S. 756 (1987) 9

Granviel v. Estelle, No. CA-4-78-115 (N.D. Tex. Jan. 26, 1979) 12

Harris v. Reed, 103 L. Ed. 2d 308 (1989). 6

Jones v. Barnes, 463 U.S. 745 (1983) 15, 17

Jurek v. Texas, 428 U.S. 262 (1976) 12, 14

Lockett v. Ohio, 438 U.S. 536 (1978) 12, 14, 26

Lowenfield v. Phelps, 98 L. Ed. 2d 568 (1988). 19

Mills v. Maryland, 100 L. Ed. 2d 384 (1988) 20

Murray v. Carrier, 477 U.S. 478 (1986) 20, 25, 26

Penry v. Lynaugh, 106 L. Ed. 2d 256 (1989) . . . . . Passim

Penry v. Lynaugh, 832 F.2d 915 (5th Cir.1987) 3

Quinones v. State, 592 S.W.2d 933 (Tex. Cr. App. 1980). 21, 23

Sumner v. Shuman, 483 U.S. 66 (1987) 19

Teague v. Lane, 103 L. Ed. 2d 334 (1989) 6, 13

Thompson v. Oklahoma, 101 L. Ed. 2d 702 (1988). 24

Tison v. Arizona, 481 U.S. 137 (1987) 24

In Re Winship, 397 U.S. 358 (1970) 11

Woodson v. North Carolina, 428 U.S. 280 (1976) 19

Zant v. Stephens, 462 U.S. 862 (1983) 19, 20, 27

MISCELLANEOUS

Baldus, Woodworth, Pulaski & Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1 (1980) 30

Baldus, Pulaski & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661 (1983) . . . 31

Baldus, Woodworth & Pulaski, Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia, 18 U.C. Davis L. Rev. 1375 (1985) 31

ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

I. THERE IS NO LEGITIMATE DISPUTE THAT THE ADEQUACY AND INDEPENDENCE OF TEXAS' PROCEDURAL DEFAULT RULE, THROUGH ITS CHAMBERS EXCEPTION, IS PROPERLY BEFORE THE COURT AND THAT THE APPLICATION OF THE RULE EXCUSES MR. SELVAGE'S DEFAULT

The State of Texas agrees with Mr. Selvage that the Texas courts follow a well-established exception to the state's contemporaneous objection rule -- that "'where a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver.'" Respondent's Brief at 28, quoting Ex parte Chambers, 688 S.W.2d 483, 486 (Tex. Cr. App. 1984). The State nevertheless maintains that the finding of waiver in Mr. Selvage's case by the state courts, and deferred to by the lower federal courts -- all more than a year before the

announcement of Penry v. Lynaugh, 106 L.Ed.2d 256 (1989) -- continues to control the threshold question of whether an adequate and independent state law ground bars review of Mr. Selvage's Penry claim. Simply stated, Texas' argument must fail because the straightforward exception to the contemporaneous objection rule plainly applies to this case, no independent state law ground otherwise supports the decision below, and the application of this rule has been timely presented by Mr. Selvage.

A. The Chambers rule governs this case

When Mr. Selvage presented his claim that the instructions at his penalty trial prevented the jury from giving mitigating effect to the evidence that he was addicted to heroin and that he was not the killer, he argued that he had been deprived of his Eighth Amendment right to an individualized sentencing

determination. In support of this claim, Mr. Selvage acknowledged that the prior decisions considering similar claims were adverse, but he urged the courts to reconsider these decisions for two reasons: a panel of the United States Court of Appeals for the Fifth Circuit had recently suggested such a denial could offend the Eighth Amendment in certain cases,[1] and this Court was examining the question in Franklin v. Lynaugh, 101 L.Ed.2d 155 (1988). He was unable to cite state court authority to support his claim because the state courts had repeatedly and without exception held that supplemental instructions were not required under the Texas capital statute, regardless of the character of mitigating evidence offered by a capital defendant.[2]

---

[1] Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987).

[2] See Brief for Petitioner at 61-66.

Accordingly, Mr. Selvage was unable to argue that any court had firmly and unequivocally accepted his position because none had. The state courts, finding on this state of the law no sufficient reason to excuse the failure to present this claim at trial, held that the claim had been waived due to the absence of objection at trial.

Critically, if this Court's subsequent decision in Penry had then been available, the state courts could not and would not have avoided the merits of the claim. The Texas courts have consistently applied the well-established exception to the contemporaneous objection rule set forth in Ex parte Chambers in situations just like Mr. Selvage's--where this Court has issued a retroactive decision that requires Texas to alter its trial process. The application of this

exception has mandated the belated consideration of previously waived claims raised in the wake of numerous decisions from this Court.[3]

The failure to now embrace the right recognized in Penry within the fold of the Chambers exception would constitute a naked example of capricious enforcement of that rule. Respondent has presented no legitimate reason why the right recognized in Penry would not trigger the Chambers exception. Manifestly, Penry did identify "a defect of constitutional magnitude" that had not been recognized previously by Texas law.

Even though the Chambers rule is a state law rule, it may be applied by this Court in the first instance. This Court has not hesitated to apply state procedural default rules in the first

---

[3] See Brief of Petitioner at 37-44.

instance to decide that claims need not be exhausted in the state courts because they would be procedurally barred. See Teague v. Lane, 103 L.Ed.2d 334, 346-48 (1989); Harris v. Reed, 103 L.Ed.2d 308, 320-22 (1989) (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., concurring). The premise for these decisions is the federal courts' obligation under the exhaustion rule to determine whether a state remedy would be available if an unexhausted claim were remanded to the state courts. Where the claim would be procedurally barred under state law, the Court has recognized that it is inefficient to remand the case to state court.

The same logic applies here, for it is as clear that Texas law would no longer bar Mr. Selvage's Penry claim as it was in Teague that Illinois law would bar Teague's claim. Judicial economy would

accordingly be served and no legitimate state interest would be disserved by this Court's application of the Chambers rule to reach the merits of Mr. Selvage's Penry claim.

B. There is no independent basis for the ruling below

The State also fails to rebut our argument that the proper default analysis is dependent upon, and not independent of, federal law, and makes several arguments we have not made.[4] The Court has plainly held that "when the resolution of the state procedural rule depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law. . . ." Ake v. Oklahoma,

---

[4] See Respondent's Brief at 29-35. For example, Respondent claims that Mr. Selvage "argues that, because the state court necessarily considered his Eighth Amendment claim, the state procedural rule is not an 'independent' state ground . . . ." Id. at 29 (emphasis supplied).

470 U.S. 68, 75 (1985).

With the Court's decision in Penry, the question here is whether the analysis under Chambers is dependent upon, or sufficiently entangled with, the federal constitutional ruling. The analysis requires an examination of whether Penry identified a defect with the Texas capital sentencing scheme which the Texas courts had not recognized previously. Surely it did. Prior to Penry, regardless of the character of one's mitigating case, the state courts had concluded that no instructions in addition to the statutory questions would be proper.[5]

For these reasons, and the others set forth in our opening brief, the judgment below does not rest upon an adequate and

[5] See Brief of Petitioner at 61-67.

independent state law ground.[6]

[6] The State argues also that the question of whether there is a valid state law ground is not "fairly included" within the question presented. See Respondent's Brief at 20-23. This argument is meritless. The two-pronged question presented -- does the record show "cause" for the lack of a timely objection, and if not, does it show that a miscarriage of justice will nevertheless result-- presumes that Mr. Selvage failed to comply with a valid procedural rule. In Greer v. Miller, 483 U.S. 756 (1987), the Court granted certiorari to determine what harmless error standard governed a violation of Doyle v. Ohio, 426 U.S. 610 (1976) in habeas proceedings. The Court ultimately decided the case by concluding that the record failed to show a Doyle violation, concluding

> [b]efore reaching the question whether the harmless-error standard applies, we must be satisfied that an error of constitutional dimension occurred. This fundamental question is fairly included in the question presented for review.

483 U.S. at 761 n.3. The question of whether an adequate and independent state ground exists is as fundamental to this case as was the question of whether there

II. BY IGNORING THE DIFFERENCE BETWEEN "PERCEIVED FUTILITY" AND LEGAL FORECLOSURE, THE STATE AND ITS AMICUS CURIAE SEEK TO HAVE THIS COURT PROPOUND A RULE THAT WOULD PROVE SEVERELY DETRIMENTAL TO BOTH STATE COURTS AND CRIMINAL DEFENDANTS.

The State and its Amicus Curiae fail to appreciate the significant differences between the concepts of "perceived futility" and legal foreclosure as they relate to the doctrine of procedural default. At the time of Mr. Selvage's

---

was a Doyle violation in Greer.

Even if the Court were inclined, as the State urges, not to reach the question of the validity of the state law ruling in Mr. Selvage's case because it was not raised previously, the Court plainly should make an exception for that part of the validity of the state ground argument which rests on the Chambers rule. That argument was not available until Penry was decided, and by that time, Mr. Selvage's certiorari petition had been pending for fifteen months. Thereafter, Mr. Selvage timely interposed his Chambers argument.

trial, the situation facing his attorney was not one of "perceived futility," as that term was used in Engle v. Isaac, 456 U.S. 107 (1982). In Engle, the Ohio courts had never been given an opportunity to reconsider the settled state practice of placing the burden of proof of self-defense on the defendant, even though a new constitutional theory calling this practice into question had emerged in In Re Winship, 397 U.S. 358 (1970). Thus, this Court held that the "perceived futility" of presenting the Winship claim to the Ohio Courts -- that is, the prediction that they would not accept the claim on the merits -- was not a sufficient cause to justify a failure to present the claim. Rather, the interests of comity dictated that the state courts should have the first opportunity to determine whether developments in federal

constitutional law affected their state practice.

By contrast, before Mr. Selvage was tried the Texas courts had repeatedly and decisively rejected federal constitutional claims of a right to supplemental jury instructions such as this Court later required in Penry. Their rejection was based on Jurek v. Texas, 428 U.S. 262 (1976), and on Lockett v. Ohio, 438 U.S. 536 (1978); and no new constitutional theory had evolved -- or been hinted at-- which the Texas courts had not considered and thoroughly laid to rest. In four separate challenges to the Texas special-issue procedure, the Court of Appeals had held that Jurek and Lockett had sanctioned the constitutionality of the Texas practice. Moreover, the only federal case that had discussed a challenge to Texas' practice also relied upon Jurek and

Lockett in rejecting that challenge. See Granviel v. Estelle, No. CA-4-78-115 (N.D. Tex. Jan. 26, 1979). Selvage's lawyer did not bypass state procedure because he predicted that it would be futile. He simply respected the authoritative rulings of the state courts and forbore to press upon them a claim which those rulings rendered legally frivolous.[7]

---

[7] There is no conflict between finding that a pre-Penry claim was foreclosed at the time of Mr. Selvage's trial and finding that, under Teague v. Lane, 103 L.Ed.2d 334 (1989), the supervening Penry decision is not a new rule of law. The kind of foreclosure that confronted Mr. Selvage's attorney was not based upon any explicit holding of this Court. It was based upon what the Court's previous holdings apparently meant in the light of their reasonable interpretation by all the lower courts that had construed them. When this Court subsequently held that the lower courts were wrong, its decision so holding was not a new rule of law for purposes of Teague. However, in view of the lower courts' unanimity regarding the apparent meaning of the Court's earlier cases, defense counsel could not fairly be expected to have anticipated the possibility of such a holding.

In this setting, the Court's recognition that the legal foreclosure of Mr. Selvage's pre-Penry claim at the time of his trial constitutes "cause" for not raising it would not vitiate the doctrine of procedural default, as the State and its Amicus extravagantly assert. It would fully observe the principle of comity because the Texas courts were given abundant opportunity to consider, and they consistently rejected, challenges to the Texas practice such as later prevailed in Penry. It hardly matters, from the standpoint of comity or practicality, whether those challenges were rejected four or forty times prior to Selvage's trial. The result -- that the Texas courts were firmly committed to the view that Jurek and Lockett sanctioned the Texas practice -- was unmistakably the

same.

Thus, the real effect of the State's and its Amicus' arguments on this point is to require that the state courts be persistently dunned with federal claims that they have thoroughly rejected. This would not further comity, but frustrate it. A state court's capacity to participate in the development of federal constitutional law as a partner in the federal system would be impeded if it were forced to hear continually the same federal arguments that it had conclusively rejected. Rather than state courts being eventually persuaded by a continuing stream of claims, as the State argues, the courts would more likely stop paying any serious attention to the claims, since "[le]gal contentions, like the currency, tend to depreciate with over-issue." Jones v. Barnes, 463 U.S. 745, 752

(1983)(quoting Justice Jackson). As a result, when that perfectly pitched case, whose facts "could clarify the gist of the claim," did come across the plate, the state courts would be too numbed to hit upon the latent constitutional violation embedded within the challenged state practice.

And there would be no way for the state courts to convince defense counsel to stop raising such claims, since procedural default would be the price paid for stopping. Cautious counsel would not opt for such a gamble, but would burden state trial and appellate proceedings with every federal claim imaginable that could be premised upon a Supreme Court decision that the state courts had distinguished--or, indeed, as here, had relied upon--in denying relief in past cases. Nor would the state courts be the only losers

if such a practice were required. Defense counsel could no longer exercise professional selectivity in choosing their claims, but would be compelled to file "brief[s] that[,] by rais[ing] every colorable issue[,] run[] the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Jones v. Barnes, 463 U.S. at 753.

It is entirely consistent with Engle to recognize that in situations where a state's courts have repeatedly read prior decisions of this Court as sanctioning a particular state practice and where there is no source of support for a contrary view in other jurisdictions, a responsible lawyer can quit challenging the practice. Under these circumstances, the legal foreclosure of a claim must be regarded as a legitimate ground of "cause" for failing

to raise the claim. Any other holding would be a serious disservice both to the efficiency and integrity of state court proceedings and to criminal defendants with potentially meritorious claims.

III. MR. SELVAGE HAS DEMONSTRATED THAT THE PENRY ERROR IN HIS TRIAL INVOLVES A FUNDAMENTAL MISCARRIAGE OF JUSTICE

A. Penry Error Is A Denial Of Basic Trial Process

The State does not take serious issue with Mr. Selvage's submission that one who is deprived of a component of a basic trial process, can, on that account alone, demonstrate a fundamental miscarriage of justice. Rather, the State argues that Penry error does not arise to the denial of a basic component of a capital trial. The State can advance this argument only by mischaracterizing the sentencing process at Mr. Selvage trial.

The right protected by Penry is the right to an individualized determination of sentence. Under settled Eighth Amendment principles, "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty" -- which in Texas occurs upon conviction of capital murder, see Lowenfield v. Phelps, 98 L.Ed.2d 568, 582 (1988); Zant v. Stephens, 462 U.S. 862, 875-76 n.13 (1983) -- '"the jury's choice between life and death must be individualized." California v. Ramos, 463 U.S. 992, 1008 (1983). The Court has emphasized time and again that this individualized determination is "a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). See also Sumner v. Shuman, 483 U.S. 66, 73-76 (1987). "What

is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. at 879 (emphasis in original). When Mr. Selvage's jury could not, under the instructions given, consider and give effect to the evidence that he was drawn into crime by his addiction to heroin and that he was not the killer, he was denied an individualized determination of his sentence. See Mills v. Maryland, 100 L.Ed.2d 384, 394 (1988), and cases cited. Thus, he was denied something far more fundamental than access to defensive evidence, see Respondent's Brief at 57, referring to Murray v. Carrier, 477 U.S. 478 (1986): he was denied consideration of the only real issue presented at the sentencing stage of his trial.

The State tries to mask this denial by treating it as the failure to give supplemental sentencing instructions allowing the jury to consider Mr. Selvage's mitigating evidence. It says that Mr. Selvage was to blame for not requesting such an instruction, which, it asserts, was available under state law. See Respondent's Brief, at 57. Since Mr. Selvage had access to a procedure through which he could have claimed his right to individualized sentencing, he cannot complain that the State deprived him of the basic trial process which must be afforded to a capital defendant.

This reasoning, which is strikingly reminiscent of the long-repudiated logic of Frank v. Mangum, 237 U.S. 309 (1915), falls with its premise. For it is sheer fantasy to suggest that if Mr. Selvage had only asked for a supplemental instruction

overriding the limitations of Texas' special-issue formulations, he would have gotten such an instruction or relief from its denial on appeal. Until Penry was announced, the Texas Court of Criminal Appeals had always held that capital defendants were not entitled to such supplemental instructions because they were deemed unnecessary to assure the constitutionally requisite consideration of mitigating evidence. See Petitioner's Brief at 60-65. Thus, even if, as the State says, the Court of Criminal Appeals never ruled that "a trial court's giving of such an instruction [would] be erroneous," Respondent's Brief at 56, no capital defendant could argue to a trial judge that he or she was entitled to the instruction. While the State implies that such instructions were to be had for the asking, it cites no cases in which any

Texas judge actually gave one.

Texas law is absolutely clear that if Mr. Selvage had requested supplemental instructions, he would not have been entitled to them. See, e.g., Quinones v. State, 592 S.W.2d 933 (Tex. Cr. App. 1980). It was Texas law, not Mr. Selvage's own doing, that deprived him of a basic component of the constitutionally required capital trial process.

B. The Standards Proposed By The State For The "Innocence" Determination Are Contrary To The Standard Dictated By Murray v. Carrier

The State, joined by its Amicus Curiae, argues that a capital defendant can establish that he or she is "innocent" of the death penalty, and is thus a victim of a fundamental miscarriage of justice, only if death was an impermissible penalty as a matter of federal or state law. Accordingly, a defendant would be

innocent of the death penalty if he or she: was a non-triggerperson who neither intended to kill nor acted with reckless disregard for human life while participating significantly in a felony murder, see Enmund v. Florida, 458 U.S. 782, 797 (1982); Tison v. Arizona, 481 U.S. 137, 157-58 (1987); is incompetent at the time of execution, Ford v. Wainwright, 477 U.S. 399 (1986); was under 16 at the time of the crime in a state without a legislatively-established minimum age for capital sentencing, Thompson v. Oklahoma, 101 L.Ed.2d 702 (1988); has severe or profound mental retardation, Penry v. Lynaugh, 106 L.Ed.2d 256 (1989); or, in Texas, could not be found beyond a reasonable doubt to have committed the murder deliberately (under special issue one) or to present a threat of future dangerousness (under special

issue two). In the alternative, the State argues that if the Court rejects the preclusion-of-death-as-a-matter-of-law test, a petitioner

> would have to demonstrate the existence at the time of trial of mitigating evidence so compelling that no rational factfinder, properly instructed and viewing all of the reliable evidence in existence at the time of the trial, could have concluded that a death sentence was appropriate.

Respondent's Brief at 52.

Neither of these tests has any support in the prior decisions of the Court. And Murray v. Carrier would have to be overruled in part to accept either of them.

For a habeas petitioner to establish a fundamental miscarriage of justice at the guilt phase, Carrier requires the

petitioner to show only that a "constitutional violation probably has resulted in the conviction of one who is actully innocent...." 477 U.S. at 496 (emphasis supplied). This test does not require the petitioner to show that, absent the constitutional error, the jury could not legally have convicted him or that no rational juror could have found guilt established beyond a reasonable doubt. The Carrier standard is one of probability, not preclusive certainty.

Thus, when Carrier's concept of innocence is utilized in connection with a capital sentencing proceeding, it cannot be limited to cases in which, in the absence of constitutional error, the death penalty could not legally have been imposed or "no rational factfinder ... could have concluded that a death sentence was appropriate," Respondent's Brief at

52. Indeed, in connection with Lockett or Penry error, there can be no such cases. The determination that a capital defendant is death-eligible is necessarily a determination that the death sentence is within the range of sentences that a rational sentencer could impose. See Zant v. Stephens, 462 U.S. at 877 (determination of death-eligibility "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder"); California v. Ramos, 463 U.S. at 1008 ("[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free ... to determine whether death is the appropriate punishment"). After finding a defendant death-eligible, the sentencer must consider all relevant mitigating

evidence, Eddings v. Oklahoma, 455 U.S. 104 (1982), but it is never required to give any particular weight to the mitigating evidence. Id. at 114-15, 117. Simply put, following a finding of death-eligibility, there can be no state of the evidence which precludes death --- i.e., in which no rational sentencer could choose the death sentence.

C. Had The Jury Been Able To Consider All The Relevant Mitigating Evidence, It Probably Would Not Have Imposed Death

The State argues from the perspective of its proposed preclusion standard that Mr. Selvage has not shown that he is innocent of the death penalty. However, when the evidence is gauged by the Carrier standard -- whether the constitutional error probably produced a death sentence that would not have been imposed without it -- Mr. Selvage has adequately established his innocence of the death

penalty.

In answer to special issue number one, the jury found that Mr. Selvage deliberately participated in the crime which led to the death of Deputy Garza. There was evidence that Mr. Selvage participated in the planning of the robbery and that he actively participated in the robbery. However, there was no evidence that the murder which occurred during the robbery was planned or specifically contemplated. Moreover, there was no evidence that Mr. Selvage committed the murder. To the extent there was any doubt about this, the evidence pointed heavily toward Wilbur Kelly as the killer. To be sure, Mr. Selvage carried a gun, threatened the robbery victims with it, and fired his gun in the course of the gun battle that erupted after Wilbur Kelly shot Deputy

Garza. However, he did not kill or injure anyone. Thus, although he engaged actively in the crime, his personal moral culpability was for robbery and aggravated assault, not for an actual, deliberate murder. Had the jury been permitted to consider the degree of his involvement in the murder as mitigating, it would probably have seen his culpability as calling for life rather than death.[8]

---

[8] There is substantial corroboration for this conclusion in the reported data concerning prosecutorial decisions to seek the death penalty and sentencing juries' decisions to impose it. In an analysis of pre-Furman jury sentencing decisions, for example, Baldus, Woodworth, Pulaski, and Kyle reported that the average death sentencing rate for single-victim cases in which the defendant killed the victim was .50 (82 death sentences imposed in 165 cases). Baldus, Woodworth, Pulaski & Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1, 44-46 (1980). In contrast, the death-sentencing rate for cases in which the defendant was not a killer was only .08 (4 death sentences imposed in 52 cases). Id. In

two post-Furman studies of death sentencing rates in Georgia by Baldus and his colleagues, which examined the combined effects of prosecutorial and jury decision-making, the results were quite similar. In cases where the defendant killed the victim in the course of committing a serious offense, the death sentencing rate was .46 (68 death sentences imposed in 147 cases) compared to .15 (19 death sentences imposed in 61 cases) where the defendant was not the killer but was a participant in the contemporaneous offense. Baldus, Pulaski & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661, 686-87 (1983). Finally, in a different analysis of the Georgia data, Baldus and his colleagues examined cases in which the murders were classified as "vile" and in which the victim was a stranger to the defendant(s). In these cases in which the killing was deliberate, the death sentencing rate was .81 (59 death sentences imposed in 73 cases) for cases in which the certainty of the deliberateness of the killing was "medium" and .88 (7 death sentences imposed in 8 cases) where the certainty was "high." By contrast, where the certainty of deliberateness of the killing was "low"--a category which included accomplices who did not kill -- the death sentencing rate was only .29 (6 death sentences imposed in 21 cases). Baldus, Woodworth & Pulaski, Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia, 18 U.C. Davis L. Rev. 1375, 1395

In answer to special issue number two, the jury found that Mr. Selvage presented the possibility of future dangerousness. Mr. Selvage had been convicted of two previous crimes and had attempted to escape from a New Orleans jail. Just four days before the Ventura's robbery, he had participated in another robbery with Wilbur Kelly, during the course of which Kelly had also killed someone. Further, Selvage was an addict, driven by his addiction toward crime and so afflicted by drugs and an underlying mental illness that he could not pull himself out of the criminal activity into which he had fallen. There was plainly a possibility of future dangerousness.

However, the aggravating weight of future dangerousness was offset by two mitigating factors. First, Mr. Selvage's

---

(1985).

ability to make considered, reality-based judgments during the course of the crimes was very seriously impaired by mental illness and drug consumption. As a result of his disabilities, he was extremely paranoid: he often misperceived simple gestures as threats and reacted self-protectively and violently. His future dangerousness was thus not driven so much by meanness of spirit as by physical and mental impairment.[9] Second, Mr. Selvage's disabilities were and are potentially responsive to therapeutic intervention. Thus, the conditions which concededly made him a future danger could be alleviated or at least diminished. For these reasons,

---

[9] The State takes issue with some of the evidence proffered by Mr. Selvage concerning the severity of his mental illness at or near the time of the crime. If the resolution of this dispute becomes material to the Court's ruling, the dispute should be resolved by a remand for appropriate factfinding proceedings in the district court.

Mr. Selvage's jury, if permitted to do so, probably would have tempered its finding of possible future dangerousness, recognized the less culpability he bore for his criminal behavior, and struck the balance in favor of a life sentence.

Respectfully submitted,

JULIUS L. CHAMBERS
*RICHARD H. BURR, III
GEORGE H. KENDALL
STEVEN W. HAWKINS
99 Hudson Street, 16th Fl.
New York, New York 10013
(212) 219-1900

DAVID CUNNINGHAM
1927 Norfolk
Houston, Texas 77098
(713) 520-7701

Counsel for Petitioner

*Counsel of Record

FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-5700 (10)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN HENRY SELVAGE,
Petitioner

v.

JAMES A. LYNAUGH, Director
Institutional Division,
Texas Department of Criminal Justice,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION

STANLEY G. SCHNEIDER
and TOM MORAN
11 Greenway Plaza
Suite 3112
Houston, Texas 77046
(713) 961-5901
Attorneys for Amicus Curiae

Akin Law Bkf Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

15 pp

TABLE OF CONTENTS

	Page
LIST OF AUTHORITIES	II
IDENTIFICATION OF AMICUS CURIAE	2
STATEMENT OF AMICUS CURIAE	2
ARGUMENTS AND AUTHORITIES	3
Smith v. Murray Requires Lawyers to Foresee Changes in the Law, not to Anticipate Unlikely Possibilities	4
No Instruction on Mitigation: An Unbroken Line of Cases	5
The Futility of Seeking an Instruction on Mitigating Evidence	8
The Texas Situation is Novel	9
Only Good Faith Arguments May Be Presented to Texas Courts	9
A Procedural Bar Would Result in a Fundamental Miscarriage of Justice	10
CONCLUSION	11
CERTIFICATE OF SERVICE	12

LIST OF AUTHORITIES

CASES	Page
Clark v. State, 717 S.W.2d 910 (Tex. Crim. App. 1986), *cert. denied*, 481 U.S. 1059 (1987)	6
Demouchette v. State, 731 S.W.2d 75 (Tex. Crim. App. 1986), *cert. denied*, 482 U.S. 920 (1987)	5, 6
Eddings v. Oklahoma, 455 U.S. 104 (1982)	5
Engle v. Isaac, 456 U.S. 107 (1982)	4, 9
Franklin v. Lynaugh, 487 U.S. 164 (1988)	5, 9, 10, 11
Jurek v. Texas, 428 U.S. 262 (1976)	*passim*
King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977), *cert. denied*, 482 U.S. 921 (1978)	5, 6
Lackey v. State, No. 69,144 (Tex. Crim. App. June 14, 1989) (not yet reported) (rehearing granted)	8
Lockett v. Ohio, 438 U.S. 586 (1978)	5, 7, 12
Mazuera v. State, No. 01-89-00244-CR (Tex. App.—Houston [1st Dist.] Sept. 28, 1989) (not yet reported)	10
McCleskey v. Kemp, 481 U.S. 279 (1987)	5
Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987)	7, 8
Penry v. Lynaugh, 492 U.S. ____, 109 S. Ct. 2934 (1989)	*passim*
Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1073 (1986)	7
Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App. 1980), *cert. denied*, 449 U.S. 893 (1980)	6
Reed v. Ross, 468 U.S. 1 (1984)	4
Smith v. Murray, 477 U.S. 527 (1986)	2, 4
South Carolina v. Gaithers, ____U.S.____, 109 S. Ct. 2207 (1989)	12

CONSTITUTIONS AND STATUTES	
TEX. CODE CRIM. PROC. ANN. art. 37.071	*passim*
SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS, art. XII, section 8 (Code of Professional Responsibility) DR 7-102(A)(2)	10

NO. 87-6700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN HENRY SELVAGE,
Petitioner

v.

JAMES A. LYNAUGH, Director
Institutional Division,
Texas Department of Criminal Justice,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION

To the Justices of the Supreme Court of the United States:

COMES NOW AMICUS CURIAE, HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION, by and through its attorneys of record, STANLEY G. SCHNEIDER and TOM MORAN, and pursuant to Rule 36.1, it would respectfully show the Court as follows:

IDENTIFICATION OF AMICUS CURIAE

The Harris County Criminal Lawyers Association [hereinafter the Association] is an unincorporated association of attorneys engaged in the practice of criminal law in the courts of Harris County, Texas. Many of the members of the Association have represented persons charged with capital murder. In addition, approximately half of the persons sentenced to death in Texas were tried in Harris County.

All parties have given the Association permission to file this brief. Copies of the letters of permission have been filed with the Clerk of this Court.

The Association appears for Petitioner.

STATEMENT OF AMICUS CURIAE

The question facing this Court is whether the procedural bar rule in *Smith v. Murray,* 477 U.S. 527 (1986), applies in Texas death penalty cases in which the defense attorney at trial did not object to the lack of instructions on consideration of mitigating evidence.

The Association believes that prior to the time this Court handed down its decision on *Penry v. Lynaugh,* 492 U.S. ____, 109 S. Ct. 2934 (1989), the law in Texas was well settled that no instructions on mitigation were necessary. An unbroken string of case law dating back to *Jurek v. Texas,* 428 U.S. 262 (1976), and including numerous decisions of the Court of Appeals for the Fifth Circuit and the Texas Court of Criminal Appeals, upheld the constitutionality and application of the Texas death penalty sentencing scheme. At some point, in the face of unanimous authority from the Supreme Court of the

United States, the Court of Appeals for the Fifth Circuit and the state's highest court for criminal cases, lawyers must be willing to accept precedent and abandon claims that are foreclosed. If, at some later date, this Court reconsiders the previously foreclosed issue and determines that its previous holdings are no longer consistent with evolving constitutional interpretation, failure to raise an issue at trial should not be a procedural bar.

The Association would show that the law in Texas was so well settled that only 12 days before this Court announced its decision in *Penry,* the Court of Criminal Appeals again rejected a similar argument.

ARGUMENTS AND AUTHORITIES

In *Jurek v. Texas,* 428 U.S. 262 (1976), this Court told the lawyers of Texas that the Texas death penalty sentencing scheme "has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." 428 U.S. at 276. This Court further held that Texas has provided a system that is "evenhanded, rational and consistent" and that the system "serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed. . . ." *Id.*

Thirteen years later, in *Penry,* this Court held that the Texas death penalty scheme embodied in TEX. CODE CRIM. PROC. ANN. art. 37.071 fails to sufficiently instruct juries in the ways to consider and give effect to all types of mitigating evidence and that Article 37.071 as interpreted by the Court of Criminal Appeals fails to provide a vehicle for the jury to provide a "reasoned moral response" to that evidence in rendering its sentence. 492 U.S. at ____, 109 S. Ct. at 2952.

The question presented to this Court in the instant case is relatively straight-forward. Stated simply, this Court is being asked to decide whether Texas lawyers should be excused from making arguments later accepted by this Court in *Penry* in the decade and a half between this Court's decision in *Jurek* and its decision in *Penry*.

The Association, for the reasons outlined below, contends that the answer should be in the affirmative.

Smith v. Murray Requires Lawyers to Foresee Changes In the Law, Not to Anticipate Unlikely Possibilities

In *Smith v. Murray*, this Court held that the procedural bar rule of *Engle v. Isaac*, 456 U.S. 107 (1982), applies when an appellate attorney makes a conscious decision to abandon a claim on direct appeal if state law would bar that claim in a later state habeas proceeding. In *Smith*, the attorney on direct appeal was also the attorney at trial. He properly preserved his error with an objection at trial but on direct appeal deliberately chose to abandon the claim because he felt the claim had little chance of success before the Virginia Supreme Court. 477 U.S. at 534.

In considering cause for procedural default, this Court has recognized that if a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has "cause" for his failure to raise the claim in accordance with applicable procedures. *Reed v. Ross*, 468 U.S. 1, 18 (1984). The key question is not the later decisions of this Court but rather whether the defendant's claim was "available" at all at the time of the default. *Smith*, 477 U.S. at 537.

Texas death penalty cases involving *Penry* issues are not situations in which a well-informed lawyer could anticipate a change in the law. Nor are they situations in which a well-informed, well-prepared lawyer would raise the issue at trial or on direct appeal. Rather, based on an unbroken string of authority, the issue of instructions on mitigation was flatly foreclosed.

No Instructions on Mitigation: An Unbroken Chain of Cases

Since 1976, the Court of Criminal Appeals has refused to reinterpret Article 37.071, to grow or to apply this Court's decisions in such cases as *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and *McCleskey v. Kemp*, 481 U.S. 279 (1987). Even in the wake of *Franklin v. Lynaugh*, 487 U.S. 164, (1988), the Court of Criminal Appeals continued to repeat dogmatically that the Texas death sentencing system was upheld in *Jurek* and that no instructions on mitigating evidence were necessary.

The most telling example of the Court of Criminal Appeals' reaction to this Court's evolving interpretation of constitutional principles can be seen in a comparison between *King v. State*, 553 S.W.2d 105 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1088 (1978); and *Demouchette v. State*, 731 S.W.2d 75 (Tex. Crim. App. 1986), *cert. denied*, 482 U.S. 920 (1987).

In *King*, the Court of Criminal Appeals overruled an argument that Article 37.071, without further definitions and instructions, does not give juries adequate guidance to determine the issues. The Court used the following language:

> In *Jurek v. Texas,* however, the Supreme Court of the United States concluded that the submission of special issues provided by Art. 37.071, *supra,* constitutionally guided the jury's determination of the punishment issues. No special definitions of the terms of that statute were required.

553 S.W.2d at 107 (citations omitted).

In *Demouchette,* the Court of Criminal Appeals was presented with the issue of whether Article 37.071 allows the jury to consider or apply mitigating evidence because the statute does not inform a jury how to apply the evidence. The Court overruled the argument with the following language (which is quoted herein in full):

> The Texas capital murder scheme, including the special issues under Article 37.071, *supra,* was held to be constitutional in *Jurek v. Texas.* The fifteenth ground of error is overruled.

731 S.W.2d at 80 (citations omitted).

In the years between *King* and *Demouchette,* the Court of Criminal Appeals specifically rejected submission of a charge of mitigation. In *Quinones v. State,* 592 S.W.2d 933, 947 (Tex. Crim. App. 1980), *cert. denied,* 449 U.S. 893 (1980), the Court of Criminal Appeals agreed with the Appellant that there was a right to present all mitigating evidence but rejected his argument that an explanatory charge is necessary to protect that right. The Court, again citing *Jurek,* said that this Court had upheld the Texas death penalty scheme.

In *Clark v. State,* 717 S.W.2d 910, 920 (Tex. Crim. App. 1986), *cert. denied,* 481 U.S. 1059 (1987), the Court again rejected an argument that Article 37.071 is unconstitutional for its failure to provide adequate

procedural safeguards by merely permitting the defendant to present all mitigating evidence without ensuring that the jury, under appropriate instructions considers and weighs the mitigating factors. Among the cases relied upon by the Court to reject Clark's argument was *Penry v. State,* 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied,* 474 U.S. 1073 (1986).

Not only did the Court of Criminal Appeals consistently reject arguments that additional instructions on mitigation were unnecessary but the Court of Appeals for the Fifth Circuit consistently agreed and, relying on *Jurek* and *Lockett,* held that such instructions were not required by the United States Constitution. In *Penry v. Lynaugh,* 832 F.2d 915, 925 (5th Cir. 1987), a panel of the Fifth Circuit questioned the viability of *Jurek* but held that Article 37.071 had been specifically upheld in *Jurek.* The panel further held as follows:

> *Jurek* expressly held that the Texas statute is constitutional. After *Jurek,* the Court has reiterated that stance a number of times. For example, in *Lockett* the Court stated that the Texas statute "survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." Similar reasoning has been used in a number of other cases. *See, e.g. Zant; Lockhart v. McCree.* We think that a strong argument can be made that developing law, *see, e.g. Hitchcock* is inconsistent. However, even if we were free to decide that inconsistency and reach a different result, *see Brock v. McCotter,* we are not free to do so because prior Fifth Circuit decisions have rejected

> claims similar to Penry's. *Riles v. McCotter; Granviel v. Estelle*. These prior panel holdings bar a different holding by us.

832 F.2d at 926 (citations omitted).

Hence, not only lawyers but also members of the Fifth Circuit recognized that the questions of mitigating instructions was foreclosed in 1987.

The Futility of Seeking an Instruction on Mitigating Evidence

In the wake of the unbroken string of rulings upholding Article 37.071, many Texas lawyers have abandoned any effort to object to the lack of instructions or definitions. The Court of Criminal Appeals had for 13 years given continuous constitutional approval to Article 37.071. For a dozen years, defense arguments that additional guidance was necessary for juries fell on deaf ears.

Although some Texas defense lawyers continued the futile objections and requests for instructions, their efforts were continually frustrated for a decade. Thereby, many Texas lawyers have not felt compelled to object to the settled and constitutionally-approved procedures in Article 37.071. Not only have Texas lawyers stopped objecting but judges on the Court of Criminal Appeals have stopped dissenting from death penalty affirmances because their dissent would be futile. This is most recently stated by Judge Miller in *Lackey v. State*, No. 69,144 (Tex. Crim. App. June 14, 1989) (rehearing granted):

> In as much as Judge Clinton's dissent continues the belief that jurors in a capital murder case need a special instruction on mitigating evidence, as aptly set out in Stewart v. State, 668 S.W.2d 118 (Tex. Crim. App. 1984) (Clinton, J. joined by Miller, J., Dissenting), I join his dissent on the disposition of point of error number four. We only stopped dissenting to the majority's steadfast refusal to require such an instruction because to continue to do so was "futile." See Johnson v. State, 691 S.W.2d 619 (Tex. Crim. App. 1984) (Clinton, J. joined by Miller, J., dissenting).

The Texas Situation is Novel

Any application of the contemporaneous objection rule to Article 37.071 would be inapplicable due to the unique Texas situation. Texas lawyers were handicapped by over a decade of interpretations of the same questions by the courts and there was no change in the response. In addition, the Texas Legislature has not intervened.

Applying the rule of *Engle v. Isaac* to the instant case would be unjust and inappropriate because of the history of the application of Article 37.071.

In *Engle v. Isaac*, this Court held that a state court defendant who perceives a constitutional claim which he believes may find favor in federal court may not bypass the less sympathetic state court. Such is not the case in the instant case and others involving Article 37.071. Until *Franklin*, this Court never questioned the constitutionality of Article 37.071. At some point, continuing to put forward arguments which have been previously rejected numerous times becomes futile.

Only Good Faith Arguments May Be Presented to Texas Courts

In Texas, an attorney faces professional discipline if if he knowingly advances a claim or asserts a position

that is unwarranted under existing law or which cannot be supported by a good faith argument for extension, modification or reversal of existing law. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS, art. XII, section 8 (Code of Professional Responsibility) DR 7-102(A)(2) [hereinafter Texas Code of Professional Responsibility].

It is difficult to see how an attorney—at least prior to *Franklin*—could argue that requests for instructions and definitions on mitigation were good faith arguments for modification or reversal of the existing law.

See also Mazuera v. State, No. 01-89-00244-CR (Tex. App.—Houston [1st Dist.] Sept. 28, 1989) (not yet reported).

A Procedural Bar Would Result in A Fundamental Miscarriage of Justice

The Association believes that the authority cited above is sufficient cause for not raising a claim based on *Penry*, at least before this Court handed down its decision in *Franklin*. Even if that position is incorrect, the Association believes that applying the procedural bar rule in this type of case would be a fundamental miscarriage of justice.

Given the strength of the authority in Texas that no instructions or definitions on mitigation were necessary, the frustration of the minority of the Court of Criminal Appeals (who later were proven right by this Court in *Penry*) and the Code of Professional Responsibility, it is easy to see how a competent and effective Texas lawyer, at least prior to *Franklin*, would fail to seek an instruction or definition on mitigating evidence in a death penalty case.

The Association submits that there are numerous cases in which mitigating evidence which is even stronger than that presented in *Penry* was introduced at trial—or could have been introduced at trial if the defense attorney believed that there was a possibility that the trial court would give a definition or instruction on the application of the mitigating evidence. As this Court pointed out in *Penry*, much of this evidence can be a two-edged sword: at the same time diminishing the defendant's blameworthiness and increasing the probability he will be dangerous in the future. 492 U.S. at ____, 109 S. Ct. at 2949.

It would be a miscarriage of justice to send those defendants to their deaths when their attorneys based their strategies on good faith reliance on the continuous rulings of the highest courts.

CONCLUSION

The Association believes that there was "cause" for the failure to raise a claim based on the arguments advanced in *Penry* and that the application of the procedural bar rule to those claims would result in a "fundamental miscarriage of justice" in light of the consistent decisions of the Court of Criminal Appeals after this Court's decision in *Jurek* and prior to *Franklin*.

Texas lawyers were entitled to rely on the long line of post-*Jurek* decisions upholding the sentencing scheme embodied in Article 37.071 and the lack of necessity for additional instructions on mitigation. As Justice Scalia wrote last Term, "Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their

existence, and the surrounding law becomes premised upon their validity." *South Carolina v. Gaithers*, ___ U.S. ___, ___, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting).

Texas lawyers and judges adjusted to the holdings of this Court in *Jurek* and its reaffirmation in *Lockett*. Neither they nor their clients should now be penalized for that reliance.

Respectfully submitted,

STANLEY G. SCHNEIDER

TOM MORAN

LAW OFFICES OF
STANLEY G. SCHNEIDER
11 Greenway Plaza
Suite 3112
Houston, Texas 77046
(713) 961-5901

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that copies of this brief of amicus curiae was served on all parties pursuant to Rule 28.

STANLEY G. SCHNEIDER

FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-6700

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN H. SELVAGE

Petitioner,

VS.

**JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS**

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

==========

BRIEF OF HARVEY EARVIN AS AMICUS CURIAE

In Support of Petitioner, John H. Selvage

==========

Robert L. McGlasson
Joseph Margulies

511 W. 7th St.
Austin, Texas 78701
512/320-8300

Counsel for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. IN THE GREAT MAJORITY OF REPORTED DECISIONS, THE TEXAS COURT HAS REVIEWED UNPRESERVED PENRY CLAIMS ON THE MERITS . 5

II. THE TEXAS LAW OF PROCEDURAL DEFAULT DEMONSTRATES THAT THERE IS NO PROCEDURAL BAR TO FRANKLIN/PENRY CLAIMS 16

III. THE STATE PROCEDURAL RULE IS INTERWOVEN WITH FEDERAL LAW AND AS SUCH CANNOT BE AN INDEPENDENT STATE GROUND FOR THE DECISION IN THIS CASE 44

CONCLUSION 56

TABLE OF AUTHORITIES

Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979) 6, 12, 13, 38

Adams v. Texas, 448 U.S. 38 (1980) . 21, 38, 42, 56

Ake v. Oklahoma, 470 U.S. 68 (1985) 4, 5, 18, 47, 4 . . . . . 8, 50, 57

Almanza v. State, 686 S.W.2d 157, 171-72 (Tex. Crim. App. 1985) 56

Argersinger v. Hamlin, 407 U.S. 25 (1972)24

Armstrong v. State, 502 S.W.2d 731, 735 (Tex. Crim. App. 1973) 27

Bell v. Lynaugh, 858 F.2d 978 (5th Cir. 1988) 16

Boulware v. State, 542 S.W.2d 677 (Tex. Crim. App. 1976) 21

Brandon v. State, 599 S.W.2d 567 (Tex. Crim. App. 1979) 27

Bridge v. Lynaugh, 863 F.2d 370 (5th Cir. 1988) 16

Burgett v. Texas, 389 U.S. 109 (1967) . 23

Burns v. State, 761 S.W.2d 353 (Tex. Crim. App. 1988) 41

Clark v. State, 717 S.W.2d 910 (Tex. Crim. App. 1986) 6, 8, 9

Cook v. State, 741 S.W.2d 928 (Tex. Crim. App. 1987) 31

Cordova v. State, 733 S.W.2d 175 (Tex. Crim. App. 1987) 40

Cuevas v. State, 641 S.W.2d 558 (Tex. Crim. App. 1982) 20, 22, 57

Cupp v. Naughten, 414 U.S. 141 (1973) 54-56

Dugger v. Adams, 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed.2d 435 (1989) 15

Engle v. Isaac, 456 U.S. 107 (1982) 31, 32

Enmund v. Florida, 458 U.S. 782 (1982) 51

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157 (1917) 48, 57

Estelle v. Smith, 451 U.S. 454 (1981) 20, 27, 28, 42, 56

Ex parte Cesarez, 508 S.W.2d 620 (Tex. Crim. App. 1974) 24

Ex Parte Chambers, 688 S.W.2d 483 (Tex. Crim. App. 1984) 4, 19, 30, 57

Ex parte Coleman, 599 S.W.2d 306 (Tex. Crim. App. 1978) 55

Ex parte Demouchette, 633 S.W.2d 879 (Tex. Crim. App. 1982) 30

Ex parte Earvin, No. 70,886 54

Ex parte Flores, 537 S.W.2d 458 (Tex. Crim. App. 1976) 24

Ex parte Granviel, 561 S.W.2d 503 (Tex. Cr. App. 1978) 37

Ex parte Hall, 546 S.W.2d 303 (Tex. Crim. App. 1977) 24

Ex parte Landry, No. 16,800-05 16

Ex parte Maldonado, 688 S.W.2d 114 (Tex. Crim. App. 1985) 56

Ex parte Martin, 479 S.W.2d 280 (Tex. Crim. App. 1972) 21, 57

Ex parte Ropollo, 558 S.W.2d 869 (Tex. Crim. App. 1977) 24

Ex parte Taylor, 484 S.W.2d 748 (Tex. Crim. App. 1972) 26

Ex parte Turner, 542 S.W.2d 187 (Tex. Crim. App. 1976) 25

Ex parte Woods, 745 S.W.2d 21 (Tex. Crim. App. 1988) 31

Field v. State, 627 S.W.2d 714 (Tex. Crim. App. 1982) 28

Fierro v. State, 706 S.W.2d 310 (Tex. Crim. App. 1986) 7, 14

Franklin v. Lynaugh, 487 U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) . . . passim

Garrett v. State, 682 S.W.2d 301 (Tex. Crim. App. 1984) 44, 52

Gholson v. State, 542 S.W.2d 395 (Tex. Crim. App. 1976) 27

Hartfield v. State, 645 S.W.2d 463 (Tex. Crim. App. 1980) 22

Henry v. Mississippi, 379 U.S. 443 (1965) 8

Herb v. Pitcairn, 324 U.S. 117, 126 (1945) 4, 7

James v. Kentucky, 466 U.S. 341 (1984) 7

James v. State, 772 S.W.2d 84 (Tex. Crim. App. 1989) 30, 41

Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 575 3,7

Johnson v. State, 691 S.W.2d 619 (Tex. Crim. App. 1984) 6, 37

Jurek v. Texas, 428 U.S. 262 (1976) . . 9

Leary v. United States, 395 U.S. 6 (1969) 25

Livingston v. State, 542 S.W.2d 655 (Tex. Crim. App. 1976) 27

Lockett v. Ohio, 438 U.S. 586 (1978) . 43

Mathews v. State, 768 S.W.2d 731 (Tex. Crim. App. 1989) 19, 30, 33

Motley v. State, 773 S.W.2d 283 (Tex. Crim. App. 1989) 6, 11, 12

Muniz v. State, 573 S.W.2d 792 (Tex. Crim. App 1978) 27

Nichols v. State, 754 S.W.2d 185 (Tex. Crim. App. 1988) 44, 50

Ocker v. State, 477 S.W.2d 288 (Tex. Crim. App. 1972) 21

Parker v. State, 649 S.W.2d 46 (Tex. Crim. App. 1983) 32

People v. Wagner, 305 P.2d 1136 (Ore. 1988) 37

Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934 ___, 106 L.Ed.2d 256 (1989) . passim

Perillo v. State, 758 S.W.2d 567 (Tex. Crim. app. 1988) 6, 10

Powell v. State, 742 S.W.2d 353 (Tex. Crim. App. 1987) 30, 31

Quinones v. State, 592 S.W.2d 933 (Tex. Cr. App. 1980) 36, 39, 40, 45

Reed v. Ross, 468 U.S. 1 (1984) . . 31, 32

Shippy v. State, 556 S.W.2d 246 (Tex. Crim. App.) 27

Sosa v. State, 769 S.W.2d 909 (Tex. Crim. App. 1989) 4, 6, 52

Stewart v. State, 686 S.W.2d 118 (Tex. Crim. App. 1984) 6, 36, 39

Turner v. State, 471 S.W.2d 56 (Tex. Crim. App. 1971) 25

Von Byrd v. State, 563 S.W.2d 883 (Tex. Crim. App. 1978) 27

Wainwright v. Sykes, 433 U.S. 72 (1977) 47

Washington v. Texas, 388 U.S. 143 (1967) 25

Wilder v. State, 583 S.W.2d 349 (Tex. Crim. App. 1979) 27

Wilkerson v. State, 726 S.W.2d 542 (Tex. Crim. App. 1989) 6, 13

Williams v. Lynaugh, 837 F.2d 1294 (5th Cir. 1988) 16

Williams v. State, 674 S.W.2d 315 (Tex. Crim. App. 1984) . . 6, 7, 9, 14, 32, 33

Witherspoon v. Illinois, 391 U.S. 510 (1968) 21

No. 87-6700

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN H. SELVAGE

Petitioner,

VS.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

==========

BRIEF OF HARVEY EARVIN AS AMICUS CURIAE

==========

INTEREST OF AMICUS

The interest of amicus is fully described in the text of the brief below.

SUMMARY OF ARGUMENT

Mr. Selvage is entitled to federal court review on the merits of his Franklin/Penry claims. The procedural bar

applied by the Texas Court of Criminal Appeals in his case is not supported by an adequate and independent state ground. Consequently, the finding of waiver is due no deference in federal court.

This result arises from considerations of well-settled state law.[1] First, in every reported decision save one, the Texas Court of Criminal Appeals has ignored the absence of a contemporaneous objection at trial and has reviewed unpreserved Franklin/Penry claims on the merits. The bar applied to Selvage is therefore an anomaly and not an adequate state ground for the decision. See Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 575, 585 (1988); Section I, infra.

Second, the settled Texas procedural

---

[1] The application of these principles to unpreserved Penry claims is currently pending before the Texas Court of Criminal Appeals in Amicus' case. Ex Parte Earvin, No. 70,886.

rule requires a review on the merits of any claim, even though not previously preserved, where the claim asserts a right that is "fundamental," Sosa v. State, 769 S.W.2d 909, 916 (Tex. Crim. App. 1989) or a "right not recognized at the time of trial." Ex Parte Chambers, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984). Both factors apply to Mr. Selvage's Franklin/Penry claims. See Section II, infra.

Third and finally, the application of a state procedural bar to claims based on this Court's decisions in Franklin and Penry is not an "independent" state ground. Instead, "the resolution of the state procedural question depends on a federal constitutional ruling." Ake v. Oklahoma, 470 U.S. 68, 75 (1985). The inquiries mandated under Texas procedural law -- i.e. whether the Penry error is fundamental under state law, and whether the Penry claim was recognized at the time of trial --

necessarily requires the Texas Court to determine the merits of the federal claim. Where, as here, the substantive claim is based on federal constitutional principles, the state procedural rule "depends on the court's federal ruling and consequently does not present an independent state ground for the decision rendered." Ake v. Oklahoma, supra at 75. See Section III, infra.

Each of these reasons, standing alone, precludes this Court from honoring the procedural bar asserted by the state with respect to Mr. Selvage's Franklin/Penry claims.

Amicus' case is pending before the Texas Court of Criminal Appeals. He is raising in the Texas Court these important issues of state law, and provides this brief as Amicus Curiae to aid this Court in its resolution of similar issues in Mr. Selvage's case.

I. IN THE GREAT MAJORITY OF REPORTED DECISIONS, THE TEXAS COURT HAS REVIEWED UNPRESERVED PENRY CLAIMS ON THE MERITS

The Texas Court of Criminal Appeals has ruled on the merits in the overwhelming majority of unpreserved Penry claims that have come before it. See e.g., Motley v. State, 773 S.W.2d 283, 286 (Tex. Crim. App. 1989); Perillo v. State, 758 S.W.2d 567, 577 (Tex. Crim. App. 1988); Wilkerson v. State, 726 S.W.2d 542, 547-48 (Tex. Crim. App. 1989); Clark v. State, 717 S.W.2d 910, 920 (Tex. Crim. App. 1986); Johnson v. State, 691 S.W.2d 619, 625-26 (Tex. Crim. App. 1984); Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984); Williams v. State, 674 S.W.2d 315, 321 (Tex. Crim. App. 1984); Adams v. State, 577 S.W.2d 717, 729-31 (Tex. Crim. App. 1979); Ex Parte Granviel, 561 S.W.2d 503, 516 (Tex. Crim. App. 1978). In only one reported decision has the Texas Court held

that an unpreserved Franklin/Penry claim was waived. See Fierro v. State, 706 S.W.2d 310, 318 (Tex. Crim. App. 1986). Moreover, in that case, the procedural ruling was an alternative holding; the Court also reviewed the claim on the merits.

This abundance of state authority flatly contradicting the holding in Selvage makes clear that the Selvage finding of waiver is not the "firmly established and regularly followed state practice that can prevent the implementation of federal constitutional rights." James v. Kentucky, 466 U.S. 341, 348-49 (1984); see also Johnson v. Mississippi, supra, at 585. In fact, the Selvage holding is directly contrary to the established practice. Therefore, under settled federal law,[2] Mr.

---

[2] "[T]he question of when and how defaults in compliance with state procedural rules can preclude our consideration of a (continued...)

Selvage's claim under Franklin and Penry is not procedurally barred from review on the merits in federal court.

The Texas Court of Criminal Appeals' decision in Clark v. State, 717 S.W.2d 910 (Tex. Crim. App. 1986), is representative of the treatment given by the court to these unpreserved Penry claims. In Clark, appellant argued that the special issues of the Texas capital sentencing statute violated the Eighth Amendment by:

> [failing to] provide adequate procedural safeguards by merely permitting the defendant to present all relevant mitigating factors at the punishment stage of the trial, without insuring the jury, under appropriate instructions from the trial court, consider and weigh these mitigating factors in answering the punishment questions.

Id. at 920. The court's decision makes

---

[2](...continued)
federal question is itself a federal question." Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 575, 585 (1988), quoting Henry v. Mississippi, 379 U.S. 443, 447 (1965).

clear that the issue was not preserved at trial: "[t]he record reflects that the appellant did not object to the charge on punishment, nor did he submit any requested instructions." Id. Nevertheless, the court's ruling rejected the claim (pre-Penry) on the merits.[3]

Similarly, in Williams v. State, 674 S.W.2d 315 (Tex. Crim. App. 1984), the appellant argued several grounds of error raising the problems ultimately confronting this Court in Penry. There the appellant argued that the first special issue precluded "proper consideration of mitigating circumstances." Id. at 320-21.

---

[3] "A majority of this Court has long held that it is not error, constitutional or otherwise, not to instruct the jury as the appellant suggests, and to repeat here what has been stated on the issue would simply unnecessarily elongate this opinion, which we decline to do." Clark v. State, 717 S.W.2d 910, 920 (Tex. Crim. App. 1986) collecting cases, including Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985) and Jurek v. Texas, 428 U.S. 262 (1976).

Appellant also urged the Court of Criminal Appeals "to provide guidance to trial courts and juries by providing some working definition of 'deliberate'." Id. at 321. He also argued that the third special issue improperly allowed the state to use mitigating evidence in aggravation of the sentence. Id. at 320-21. The court rejected each of these claims on the merits, noting at the same time that "appellant did not request any charges, nor did he object to those given." Id. at 321.

In Perillo v. State, 758 S.W.2d 567, 577 (Tex. Crim. App. 1988), the court considered whether "the trial court erred in failing adequately to instruct the jury to consider any mitigating evidence bearing on its deliberations at the punishment stage. Appellant neither objected to the absence of such a charge, nor requested that a particular charge be given." (emphasis added). The court rejected the

claim on the merits, observing that the claim had been "steadfastly overruled" in the past.

In Motley v. State, 773 S.W.2d 283 (Tex. Crim. App. 1989), appellant argued that without a definition of "deliberately" in his case, special issue number one "preclude[d] the jury from considering mitigating circumstances." Id. at 286. The court rejected this claim on the merits. A review of the record in Motley reveals, however, that appellant neither raised objections to the charge, nor requested special instructions.[4] Similarly,

---

[4] See Motley v. State, Case No. 69,452, R. at Vol. XIX, p. 124:

> THE COURT: It is the understanding of the Court that both of you have read [the charge on punishment] and there is no objection to the Court's charge; is that correct....?
>
> MR. CANNON (Defense Counsel): Yes, Your Honor. That's correct.

(continued...)

in Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), appellant argued that the statute was unconstitutional as applied because "there are no provisions for jury leniency if all the special issues are answered affirmatively" even if on the basis of the mitigating evidence the jury believes "the defendant does not 'deserve' a sentence of death." Id. at 729-30.[5] The Court of Criminal Appeals rejected Adams' claim on the merits, though once again, a review of the record indicates that Adams lodged no objection to the jury charge at trial.[6]

---

[4](...continued)

[5] In fact, Penry raised the identical argument in state court. Penry v. State, 691 S.W.2d 636, 653-54 (Tex. Crim. App. 1985).

[6] See Adams v. State, Case No. 60,027, R. at Vol. V, p. 1428:

(continued...)

Finally, in Ex Parte Granviel,

---

[6](...continued)

> THE COURT: Do you have any objections, Mr. White [Defense Counsel], to the [punishment] Charge?
>
> MR. WHITE: No, Your Honor.

See also Wilkerson v. State, 726 S.W.2d 542, 547-48 (Tex. Crim. App. 1989) (court rejects on merits claim that statute must clarify 'probability' to avoid constitutional infirmity, despite failure to object to the charge at trial, and despite state's assertion of waiver in its brief on appeal. Brief for Appellee at 29.)

Other rulings on unpreserved Penry claims are at best ambiguous, with the Court not clearly relying on a procedural default. For instance, in Williams v. State, 622 S.W.2d 116, 120 (Tex. Crim. App. 1981), the court considered appellant's unpreserved contention that "a charge on all mitigating evidence at the punishment phase of a capital murder trial is imperative if the jury is to give meaningful consideration to such evidence." The court overruled the objection, holding, "absent ... an objection or requested instruction, the trial court's failure to charge the jury as to the consideration of mitigating circumstances was not reversible error." In other words, the failure to preserve error did not waive the claim, but rather, merely made success on the merits more difficult.

appellant argued that the Texas statute "prevents the jury from considering a defendant's mental condition as a mitigating factor...." 561 S.W.2d at 516. The court rejected this claim on the merits, even though a review of the record indicates that Granviel made no request for special instructions and lodged no such objection to the statute at trial.[7]

Measured against this formidable array of cases is the one published decision of the Texas Court of Criminal Appeals suggesting that trial counsel's failure to request instructions at the sentencing

---

[7] Granviel's only objection at trial was that the jury instructions at the punishment phase impermissibly shifted the burden to the defendant. See Ex Parte Granviel, Case No. 56267, Vol. 17, p. 3261. This objection would not be sufficient to preserve error relating to consideration of mitigating evidence, since an objection will not be considered on appeal if it varies from the objection lodged at trial. See Pyles v. State, 755 S.W.2d 98 (Tex. Crim. App. 1988). The Penry error, in other words, was unpreserved.

phase left the appellate court with "nothing for review" on appeal. See Fierro v. State, 706 S.W.2d 310, 318 (Tex. Crim. App. 1986). In Fierro, after stating that nothing was presented for review, the court nevertheless proceeded to review the merits of the claim. 706 S.W.2d at 318.

Thus the Texas Court's summary treatment of Mr. Selvage's Franklin/Penry claims in its unpublished adoption of the lower court's finding of procedural bar is clearly out of step with a long line of published precedent directly to the contrary. Selvage, then, in no way represents the "firmly established and regularly followed state practice" in Texas. James v. Kentucky, 466 U.S. at 348.[8]

---

[8] Compare Dugger v. Adams, 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed.2d 435, 445-46 n.6 (1989), suggesting that the sporadic failure of the Florida Supreme Court to apply a procedural bar to claims under Caldwell v. Mississippi, 472 U.S. 320 (1985), when measured against numerous (continued...)

At most, Selvage shows that in an insignificant minority of cases the settled rule is not applied. Therefore, Selvage is not supported by an adequate state ground, and the federal courts are obliged to review the merits of Mr. Selvage's Franklin/Penry claims.[9]

---

[8](...continued)
consistent applications of a procedural bar on such claims, did not undermine the adequacy of the state ground. Here, by contrast, it is the procedural bar that the Texas Court applies only sporadically.

[9] In fact under state law, the decision in Selvage has no precedential value. See Tex.R.App.P. 90(i) ("Unpublished opinions shall not be cited as authority by counsel or by a court.") Thus, not only does Selvage contradict settled authority, it provides authority for nothing, including the law in Texas on procedural bar of Franklin/Penry claims. For this reason, other orders of the Texas Court of Criminal Appeals defaulting unpreserved Franklin/Penry claims have no bearing on the rule in Texas. Just as with Selvage, these unpublished orders have no precedential weight and cannot serve to put litigants on notice of the rule in Texas. See Williams v. Lynaugh, 837 F.2d 1294, 1296 (5th Cir. 1988) (noting state court's implied finding of waiver, and then rejecting under federal procedural default law because of novelty (continued...)

II. THE TEXAS LAW OF PROCEDURAL DEFAULT

As demonstrated above, the Texas Court of Criminal Appeals has repeatedly refused to apply a procedural bar to unpreserved Franklin/Penry claims. But even if the

---

[9](...continued)
of Franklin/Penry claim); Bridge v. Lynaugh, 863 F.2d 370 (5th Cir. 1988) (Bridge III) (rejecting both Bridge II and Bridge I without comment), replacing Bridge v. Lynaugh, 860 F.2d 162 (5th Cir. 1988) (Bridge II), (rejecting state waiver as not an adequate and independent state ground) replacing Bridge v. Lynaugh, 856 F.2d 712 (5th Cir. 1988) (Bridge I) (same as Bridge II). Cf. Bell v. Lynaugh, 858 F.2d 978 (5th Cir. 1988) (upholding state's implied finding of waiver, without reference to Williams precedent); Hawkins v. Lynaugh, 862 F.2d 487 (5th Cir. 1988) (same); Ex Parte Landry , No. 16,800-05 (summarily adopting trial court's finding of waiver).

Yet even if these summary unpublished orders had any precedential weight, and they do not, the number of published Texas decisions expressly rejecting a finding of waiver of Franklin/Penry claims is still greater than the number of unpublished orders, such as Selvage, adopting lower court findings. Thus the ultimate conclusion is the same: there is no adequate state ground requiring deference by the federal courts.

Texas Court were to apply its procedural bar rule to such claims, the result would be the same: the Court would review unpreserved Franklin/Penry claims on the merits.

The Texas rule governing procedural bar has two dimensions. First, Texas has a "change in law" rule. This rule holds that if the claim asserts a right that had not been recognized by the Texas Court at the time of trial, then there is no waiver.[10] Second, Texas has a fundamental error doctrine excusing lack of a contemporaneous

---

[10] The Texas rule is similar to the rule in Florida, Maryland, and Oklahoma. In each of these states, this rule has been applied to excuse trial waivers in cases where an intervening decision of this Court overturned prior state precedent. See, e.g., Hall v. State, 541 So.2d 1125, 1126 (Fla. 1989)(Hitchcock error not barred regardless of trial waiver); State v. Colvi, 548 A.2d 506, 518 (Md. 1988)(Mills v. Maryland error not waived, despite default at trial); Cartwright v. State, 708 P.2d 592, 594 (Okla. Crim. App. 1985)(Ake error is change of law justifying review on merits of unpreserved claim).

objection at trial.[11] This doctrine clearly encompasses Franklin/Penry claims, and excuses any failure to preserve the issue at trial. In Mr. Selvage's case, under both dimensions of the Texas rule, the finding of waiver does not comport with settled state authority.

A. Rights Not Recognized At the Time of Trial

1. The Rule

Texas law provides that "a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized." Ex Parte Chambers, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984) (Campbell, J., concurring) (emphasis added). Under Texas law, rights are "not recognized" either because of

[11] The Texas rule is much like the rule in Oklahoma addressed by this Court in Ake v. Oklahoma, 470 U.S. 68, 75 (1985).

novel developments in the law since trial[12], or because Texas law at the time of trial was settled against the claim and thus an objection would have been futile.[13] In either scenario, the Texas Court of Criminal Appeals will excuse any default at

[12] See, e.g., Mathews v. State, 768 S.W.2d 731, 733 (Tex. Crim. App. 1989)(Upon "[f]inding a constitutional claim sufficiently 'novel', we hold there is no procedural default."); Ex parte Woods, 745 S.W.2d 21, 25 (Tex. Crim. App. 1988); Cook v. State, 741 S.W.2d 928, 944 (Tex. Crim. App. 1987)("[I]t has been said, '[W]here a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver'", quoting Ex parte Chambers, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984)(Campbell, J., concurring).

[13] See e.g., Ex parte Woods, 745 S.W.2d 21, 25 (Tex. Crim. App. 1988) (failure to object to psychiatric testimony on future dangerousness prior to Estelle v. Smith, 451 U.S. 454 (1981), does not bar claim in light of "apparent futility" of such an objection); Cook v. State, 741 S.W.2d 928, 944 (Tex. Crim. App. 1987) (same); Cuevas v. State, 641 S.W.2d 558, 563 (Tex. Crim. App. 1982) (no procedural default of Witherspoon-Adams claim since "at the time of this trial our case law made it abundantly clear that an objection ... would be futile").

trial and review the merits of the claim. The analysis is undertaken by the Texas Court on a case-by-case basis and depends on the state of Texas law at the time of the trial. This principle has operated in Texas without interruption for nearly two decades.

The Court of Criminal Appeals has applied this "right not recognized" rule in a variety of contexts. For example, the Texas Court applied the rule to a number of unpreserved Witherspoon claims. See Witherspoon v. Illinois, 391 U.S. 510 (1968). In Ocker v. State, 477 S.W.2d 288 (Tex. Crim. App. 1972) and Ex parte Martin, 479 S.W.2d 280 (Tex. Crim. App. 1972), counsel failed to preserve Witherspoon claims at trial. The Court nonetheless granted relief on the merits. As it later explained, "[n]o objection to a prospective juror was required" since the trials took place before Witherspoon was decided by

this Court and recognized by the Texas Court. Boulware v. State, 542 S.W.2d 677, 681-82 (Tex. Crim. App. 1976).

The rule was also applied to excuse the failure to preserve claims under this Court's decision in Adams v. Texas, 448 U.S. 38 (1980) (applying Witherspoon to strike down Texas capital jury oath). In Hartfield v. State, 645 S.W.2d 463 (Tex. Crim. App. 1980), for instance, appellant presented an unpreserved Adams claim. The state argued that Hartfield had waived his claim, but the Court of Criminal Appeals disagreed, concluding:

> ... at the time [venireman] Hlozk was excused, Sec. 12.31(b) was considered constitutional even to the extent that it allowed exclusion of prospective jurors on a broader ground than Witherspoon, supra, and consequently, there was no reason for appellant's counsel to strenuously attempt to preserve this error. We find that appellant did not waive this error.

645 S.W.2d at 441.

The Court applied the same rule in Cuevas v. State, 641 S.W 2d 558 (Tex. Crim. App. 1982). There the Texas Court excused trial counsel's pre-Adams failure to object properly to the exclusion of a juror. The Court reasoned that "at the time of this trial our case law made it abundantly clear that an objection to Sec. 12.31(b) exclusion on Witherspoon grounds would be futile." (emphasis added).[14]

The application of the "right not

---

[14] The cases decided after Witherspoon and Adams illustrate the two ways in which the Texas Court will hold that a right is "not recognized": first, the Texas Court may not have "recognized" the claim because it was so novel as to never have been previously raised in Texas, as was the case with Ocker and Martin; and second, a claim may not have been "recognized" because it had been repeatedly raised and rejected by the Texas Court, as was the case with Hartfield and Cuevas. The critical inquiry then, is whether the claim had been recognized; the reason why it had not, either because of novelty or futility, is irrelevant. Texas applies a single test to every case: whether the Texas Court had previously recognized the claim. If not, then there is no waiver.

recognized" principle in Texas is not limited to capital cases. For instance, after this Court held in Burgett v. Texas, 389 U.S. 109 (1967) that prior uncounseled felony convictions could not be used to enhance the sentence in a subsequent case, the Court of Criminal Appeals reviewed a number of unpreserved Burgett claims on the merits. Since the trials occurred prior to the decision in Burgett, "no claim can be made that petitioner waived this contention by failing to object at trial." Ex parte Ropollo, 558 S.W.2d 869, 871 (Tex. Crim. App. 1977). See also Ex parte Hall, 546 S.W.2d 303, 304 (Tex. Crim. App. 1977); Ex parte Flores, 537 S.W.2d 458, 459 (Tex. Crim. App. 1976). Similarly, in Ex parte Cesarez, 508 S.W.2d 620, 622 (Tex. Crim. App. 1974), the Texas Court granted relief after the petitioner had received an enhanced sentence based on prior uncounseled misdemeanor convictions. The

trial took place two years before Burgett and five years before Argersinger v. Hamlin, 407 U.S. 25 (1972). "Consequently, counsel's failure to object upon a ground not yet established" did not waive the claim. Ex Parte Cesarez, supra, 622 (emphasis added).

The same rule has been applied in other non-capital contexts where this Court expressly overruled Texas' interpretation of applicable constitutional principles. For example, this Court's decision in Washington v. Texas, 388 U.S. 143 (1967) overruled Texas decisions concerning the compulsory process provisions of state law. In response, in Ex parte Turner, 542 S.W.2d 187, 189 (Tex. Crim. App. 1976), the Texas Court held that the failure to call a co-indictee as a witness, in obedience to the statute subsequently struck down by the Supreme Court, did not waive the compulsory process claim. In Turner, the Court

excused the default in state post-conviction proceedings, even though counsel had failed to raise the issue either at trial or on direct appeal. See Turner v. State, 471 S.W.2d 56 (Tex. Crim. App. 1971).

Likewise, in Leary v. United States, 395 U.S. 6 (1969), this Court held that convictions under the federal Marijuana Transfer Act violated the Fifth Amendment. The Texas Court of Criminal Appeals in Ex parte Taylor, 484 S.W.2d 748 (Tex. Crim. App. 1972), then granted relief to a petitioner who had failed to object at his trial in 1961 to an enhanced sentence based on a prior conviction under this Act. The Court reasoned that since it had not previously recognized the claim made available by Leary, he could not be faulted for failing to object. 484 S.W.2d at 752.

Finally, in 1984, the Court of Criminal Appeals unified these prior lines

of authority and restated their holdings as a single proposition: "a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized". Ex parte Chambers, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984)(Campbell, J., concurring).

In Chambers, petitioner went to trial before this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981). At the time of Chambers' trial, the law in Texas was clear: state psychiatric interviews of capital defendants, followed by psychiatric testimony at trial on future dangerousness implicated neither the Fifth nor Sixth Amendment. See, e.g., Armstrong v. State, 502 S.W.2d 731, 735 (Tex. Crim. App. 1973); Livingston v. State, 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976), cert. denied,

431 U.S. 933 (1977).[15] Like Selvage, Chambers failed to raise any objection at trial to what would in his case become the Smith error.

After Chambers' trial, this Court in Smith rejected the prior Texas case law and held that a trial court violates both the Fifth and Sixth Amendment when it admits psychiatric testimony on future dangerousness based on interviews conducted without Miranda warnings to the defendant and without advance notice to defendant's counsel. 451 U.S. 454 (1981).[16]

---

[15] See also Gholson v. State, 542 S.W.2d 395, 400 (Tex. Crim. App. 1976), cert. denied, 432 U.S. 911 (1977); Shippy v. State, 556 S.W.2d 246, 254 (Tex. Crim. App.), cert. denied, 434 U.S. 935 (1977); Von Byrd v. State, 563 S.W.2d 883, 897 (Tex. Crim. App. 1978); Muniz v. State, 573 S.W.2d 792, 795, n.5 (Tex. Crim. App 1978): Wilder v. State, 583 S.W.2d 349, 358-59 (Tex. Crim. App. 1979); Brandon v. State, 599 S.W.2d 567, 576 (Tex. Crim. App. 1979).

[16] In Field v. State, 627 S.W.2d 714 (Tex. Crim. App. 1982), Justice McCormick described the impact of Smith on Texas law:

(continued...)

In response to Smith, and despite trial counsel's failure to preserve the claim at trial, the Texas Court of Criminal Appeals in Chambers expressly held that the claim was not procedurally barred and granted full relief on the merits in post-conviction proceedings. Speaking for six members of the court, Justice Campbell reviewed the prior case law and summarized

---

[16](...continued)

> Both holdings in Estelle v. Smith changed the law in Texas. This Court had for years rejected claims on these bases. Never before had it been held that a court-appointed mental health expert must warn a defendant of his right to remain silent and that evidence adduced in the psychiatric interview could be used against him. Never before had it been held that the defendant's attorney could receive notice before a psychiatric interview on the dangerousness issue could be held. In fact, in numerous cases this Court rejected the contentions that the proceedings used in Estelle violated a defendant's rights.

627 S.W.2d at 723-24 (McCormick, J., concurring). Justice McCormick's remarks in Field describe equally well the effect of the Penry decision on Texas law.

the Texas change in law rule. His articulation of the principle -- "a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized" -- remains the rule today. Ex Parte Chambers, 688 S.W.2d at 486. See e.g., Mathews v. State, 768 S.W.2d 731, 733 (Tex. Crim. App. 1989); James v. State, 772 S.W.2d 84, 101 (Tex. Crim. App. 1989)("Chambers sets out the test which determines when a judicial decision, decided subsequent to a defendant's trial, relieves that defendant from making a contemporaneous objection"); Powell v. State, 742 S.W.2d 353, 66 (Tex. Crim. App. 1987) (the "right not recognized" rule is "part of our state procedural default rule dealing with preservation of constitutional error.") (Onion, C.J., dissenting on other grounds).

Applying this rule, the Texas Court has reviewed a number of other unpreserved Smith claims, including claims first raised on direct appeal, as well as those raised in state habeas petitions. See, e.g., Ex parte Demouchette, 633 S.W.2d 879, 881 (Tex. Crim. App. 1982) (reviewing merits of unpreserved Smith error); Powell v. State, 742 S.W.2d 353, 356-58 (Tex. Crim. App. 1987) (same); Cook v. State, 741 S.W.2d 928, 944 (Tex. Crim. App. 1987) (same); Ex parte Woods, 745 S.W.2d 21, 25 (Tex. Crim. App. 1988) (same).

The Chambers rule is a state rule, distinct from the federal procedural default doctrine set forth in Engle v. Isaac, 456 U.S. 107 (1982) and Reed v. Ross, 468 U.S. 1 (1984). In fact, contrary to Respondent's characterizations of state law in its response to Appellant's motion to certify a question, the Court in Chambers expressly considered and rejected

the Engle/Reed standard in favor of "this State's own procedural default rule." Ex parte Chambers, 688 S.W.2d at 486 (Campbell, J., concurring) (emphasis in original).

In Chambers the court reviewed Engle and Reed, and concluded:

> "While the teachings of Engle and Reed may be instructive, they are in no way binding on this Court. The rules enunciated in Engle v. Isaac and Reed v. Ross concern the exercise of federal habeas jurisdiction once a State procedural default has been shown. ... I do not interpret these cases as attempting to impose a federal procedural waiver standard to be used by State courts."

688 S.W.2d at 486 (Campbell, J., concurring) (emphasis added).[17]

Recently, the Texas Court repeated its

---

[17] In Chambers, the Court of Criminal Appeals overruled Parker v. State, 649 S.W.2d 46 (Tex. Crim. App. 1983), which had attempted to change the state rule by adopting and applying the federal rule in Engle v. Isaac, 456 U.S. 107 (1982). Chambers, supra, at 486.

rejection of the federal standard. See Williams v. State, 773 S.W.2d 525 (Tex. Crim. App. 1988) (applying Chambers rule to unpreserved Batson claims). In the initial opinion in Williams, a plurality of the court attempted to change the state rule and apply the Engle/Reed standard. Id. at 530-35. A majority of the court disagreed with the plurality on this point. Id. at 539.

On rehearing, in a two paragraph per curiam opinion, seven members of the court upheld the result reached by the plurality, but expressly rejected the Engle/Reed standard, relying instead on "the reasons given in Mathews v. State...." Id. at 542. In Mathews, 768 S.W.2d at 733, the Texas Court had rejected the Engle/Reed analysis and reaffirmed Chambers (with its similar rejection of the federal rule) as the applicable rule in Texas. This reaffirmation of the state standard in

Williams converted a four judge plurality into a seven judge majority.[18]

In short, on several occasions a minority of the Texas Court of Criminal Appeals has attempted to alter the longstanding Texas rule that if the right had not been recognized at trial, for whatever reason, then there is no waiver of the claim. On every such occasion, the majority has rejected any change toward the federal standard, and re-affirmed the enduring precedent. Texas has its own

---

[18] In fact, there are nine votes for the rule in Chambers, since the two dissenters in Mathews and Williams, Justices Miller and Teague, do not reject the rule in Chambers, but rather reject the majority's application of that rule to unpreserved Batson claims. See Mathews v. State, 768 S.W.2d at 733-36; Williams v. State, 773 S.W.2d at 542, Indeed, Justices Teague and Miller joined Justice Campbell in his original concurrence in Chambers. 688 S.W.2d at 486. There is, in other words, unanimous agreement on the Texas Court of Criminal Appeals that the procedural default rule in Texas is properly stated in Chambers, and not in Parker's apparent adoption of Engle/Reed.

change of law doctrine, and that doctrine makes one inquiry: whether the Texas Court has recognized the claim. If not, there is no waiver.

2. The "Right Not Recognized" Rule As Applied to Franklin/Penry Claims

If ever there were a right not previously recognized in Texas, it is the right announced by this Court in Penry v. Lynaugh, 106 L.Ed.2d 256 (1989). In an unbroken line of cases prior to Penry, the Texas Court of Criminal Appeals had rejected every variant of the claim ultimately accepted by this Court. Litigants had argued that the statute precluded the consideration of mitigating circumstances, that the statute required a definition of critical terms to guide the jury in its consideration of mitigating circumstances, and that the statute as applied and on its face was too vague to

allow for the consideration of mitigating circumstances.[19] Without exception, the

---

[19] Penry's attorney also raised these claims in several ways. See, Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed.2d 256, 273 (1989) ("Defense counsel raised a number of objections to the proposed charge to the jury.... [H]e objected that the charge failed to define the term 'deliberately.'... [H]e objected that the charge failed to define the terms 'probability,' 'criminal acts of violence,' and 'continuing threat to society.' Defense counsel also objected to the charge because it failed to 'authorize a discretionary grant of mercy based upon the existence of mitigating circumstances' and because it 'fail[ed] to require as a condition to the assessment of the death penalty that the State show beyond a reasonable doubt that any aggravating circumstances found to exist outweigh any mitigating circumstances.' In addition, the charge failed to instruct the jury that it may take into consideration all of the evidence whether aggravating or mitigating in nature which was submitted in the full trial of the case." (citations omitted)).

As noted in the cases discussed in text, defense counsel over time made each of these objections, as well as other similar objections. Though the form of the objection varied, the Texas Court's rote response did not. See, e.g., Cordova v. State, 733 S.W.2d 175, 189-90 (Tex. Crim. App. 1987)(Although the issue has been presented in many different forms, this Court has consistently rejected the

(continued...)

Texas Court rejected the claim.[20]

---

[19](...continued)
contention that the Texas statutory capital murder scheme ... require that the trial court give an affirmative instruction that the jury must consider or apply mitigating evidence in their deliberations.")

The Texas Court repeatedly invoked this Court's decisions in Jurek v. Texas, 428 U.S. 262 (1976) and Lockett v. Ohio 438 U.S. 586 (1978), as well as its own decisions rejecting these claims based on the same federal authority, see e.g., Quinones v. State, [[cite]] (rejecting several Penry-type claims based on, inter alia, this Court's decisions in Jurek and Lockett). See, Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984)(relying on Jurek, court rejects merits of appellant's unpreserved claim that statute as applied violated the eighth amendment "because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of the trial"); Johnson v. State, 691 S.W.2d 619, 625-26 (Tex. Crim. App. 1984)(rejecting on merits appellant's unpreserved claim that Texas statute as applied in his case violated Lockett v. Ohio because it failed to "clearly guide the jury in understanding mitigating circumstances ... and [inform the jury of the] option to recommend life imprisonment even though aggravating circumstances are found.")

[20] In fact, no court in the entire country had accepted the claim prior to Penry. The Fifth Circuit, as well as every federal district court to address the (continued...)

By the time of Mr. Selvage's trial, the question was already settled in Texas. In Ex Parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978), for instance, the petitioner argued that the statute "as applied is unconstitutional because it prevents the jury from considering a defendant's mental condition as a mitigating factor in relation to the two or possibly three statutory special issues to be submitted to the jury at the penalty stage of a capital murder trial." Id. at 516. The Texas Court rejected this claim, concluding that "the jury in answering the special issues may properly consider all the evidence adduced during both the guilt and punishment phases of the trial." Id.

---

[20](...continued)
question, had rejected it, as had the only other state court to consider the claim. People v. Wagner, 752 P.2d 1136 (Ore. 1988) (upholding the Oregon statute against Penry/Franklin challenges, relying in part on Texas authority).

Similarly in Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), rev'd on other grounds sub. nom. Adams v. Texas, 448 U.S. 38 (1980), the appellant "argue[d] that [mitigating] evidence is of no avail to the defendant if the jury is convinced by the evidence . . . that the punishment issues should be answered affirmatively," because "the punishment of death is [then] mandatory even though the jury, on the basis of the mitigating evidence, may believe that death is inappropriate." 577 S.W.2d at 729. This claim was rejected.[21]

Finally, in Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App. 1980), the appellant argued that "an explanatory charge is necessary to keep the jury from disregarding the [mitigating] evidence properly before it." Id. at 947. Again, the Court soundly rejected this claim. It

---

[21] Furthermore, as noted in Section I, Adams was an unpreserved claim.

held:

> The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required.

(emphasis added). Id.[22]

---

[22] After Mr. Selvage's trial, the Texas court continued its resistance to the Penry claim. See, e.g., Stewart v. State, 686 S.W.2d 118, 121 (Tex.Cr.App. 1984) ("[f]urther, we held in Quinones v. State, supra, that no jury charge regarding evidence of any mitigating circumstances was necessary since the questions prescribed under Article 37.071 clearly allow the jury to grasp the logical relevance of mitigating evidence"); Cordova v. State, 733 S.W.2d 175, 189-190 (Tex. Cr. App. 1987) ("[u]nder our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues.... Although the issue has been presented in many different forms, this Court has consistently rejected the contention that the Texas statutory capital murder scheme and the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution require that the trial court give an affirmative instruction that the jury must consider or apply mitigating evidence in their deliberations"); Burns v. State, 761 S.W.2d 353, 358 (Tex. Cr. App. 1988) (Quinones itself teaches that '[t]he jury can readily grasp the logical relevance of mitigating evidence to the [special]

(continued...)

Like Adams v. Texas and Estelle v. Smith, Penry v. Lynaugh rejected an unbroken line of state authority. This Court held in Penry that the Texas capital sentencing statute violates the Eighth Amendment by precluding the jury from considering and giving effect to certain types of mitigating evidence. Just as it was in response to Adams and Smith, the Texas Court is now bound by its well-

---

[22](...continued)
presume the jury will understand the significance of evidence proffered in mitigating, and will give such evidence mitigating weight at its discretion, in resolving special issues") (footnote omitted); James v. State, 772 S.W.2d 84, 102 (Tex. Crim. App. 1989) ([R]egardless of the evidence presented [in mitigation], appellant was not entitled to the requested instruction. This Court has repeatedly held that, although a capital murder defendant has a right to have certain evidence considered in mitigation of punishment, he is not entitled to jury instructions informing the jury that certain evidence may be considered or how it may be applied.") (emphasis added).

A more complete list of Texas cases rejecting the Penry claim appears in the Appendix to this Brief.

settled "right not recognized" doctrine to review the merits of unpreserved Penry claims.[23] There is no bar, therefore, to federal court review of Mr. Selvage's Penry claim on the merits.

B. Fundamental Error

Mr. Selvage claims that the Texas capital sentencing scheme operated in his case to preclude the jury from giving appropriate consideration to evidence that was presented or available for presentation at the sentencing phase of his trial. His claim thus arises from the bedrock Eighth Amendment principle that the sentencer in a capital trial may not be precluded "from considering any aspect of a defendant's character and record or any circumstances of his offense as an independent mitigating

---

[23] As noted previously, this precise issue is presently before the Texas Court in Amicus' case.

factor" in support of a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 607 (1978).

In Texas, a failure to object to the jury charge does not waive fundamental error of this nature. E.g., Nichols v. State, 754 S.W.2d 185, 198 (Tex. Crim. App. 1988); Garrett v. State, 682 S.W.2d 301, 307 (Tex. Crim. App. 1984). Error is fundamental if it "create[s] such harm that it deprives appellant a fair and impartial trial." Nichols, at 198.

There can be no doubt that a Penry error is fundamental. By definition, a Penry violation means that the accused has been deprived of his constitutional guarantee that the attorney be allowed to present, and the sentencer be required to consider and credit, relevant mitigating evidence. Moreover, as Penry notes, the Texas scheme provides the jury with a ready vehicle for crediting the aggravating edge

of "double-edged sword" evidence, but deprives them of a corresponding means to consider and credit the mitigating edge. Under this scenario, it cannot be suggested that the trial is "fair" or "impartial". Indeed, it is the essence of a Penry violation that the sentencing deliberation was fundamentally unfair. In Texas, therefore, the violation is fundamental, and cannot be waived for failure to object at trial.[24] Mr. Selvage's Franklin/Penry

---

[24] The Court of Criminal Appeals implicitly acknowledged as much when it reviewed the merits of an unpreserved Penry claim for fundamental error in Sosa v. State, 769 S.W.2d 909, 916 (Tex. Crim. App. 1989). Under the pre-Penry view of the law, the court found no fundamental error. Following Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App. 1980), the court held that "no jury charge regarding evidence of any mitigating circumstances was necessary since [the statute] clearly allowed the jury to grasp the logical relevance of mitigating evidence." This analysis is simply wrong under Penry. Therefore, if Sosa states the test for fundamental error based on a Penry violation, and since Sosa would be decided differently after Penry, then Penry error is fundamental.

claims are not procedurally barred.

III. THE STATE PROCEDURAL RULE IS INTERWOVEN WITH FEDERAL LAW AND AS SUCH CANNOT BE AN INDEPENDENT STATE GROUND FOR THE DECISION IN THIS CASE

As noted in Section II, the Texas procedural bar rule has two dimensions: first, the Court of Criminal Appeals will review unpreserved challenges to the jury charge only if the claim presents a question of "fundamental error"; second, the Court will review any unpreserved claim if the basis for that claim had not been recognized in Texas at the time of trial. As demonstrated below, since both aspects of the Texas rule depend integrally on the operation of federal constitutional principles, the rule cannot be an independent state ground for the decision. Consequently, absent an independent ground, there is no barrier to the consideration in federal court of the merits of Mr.

Selvage's federal claim.

A. The State Ground Must Be Independent of Federal Constitutional Principles

Absent a showing of cause and prejudice, the federal courts will not review judgments of state courts which rest upon independent state grounds. See Wainwright v. Sykes, 433 U.S. 72 (1977). This rule follows from the principle that federal courts cannot issue advisory opinions; if the state court judgment would stand independent of the ruling by a federal court on the federal claim, then the opinion by the federal court would be merely advisory. See Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

But "when resolution of the state procedural law question depends on a federal constitutional ruling," Ake v. Oklahoma, 470 U.S. 68, 75 (1985), the federal court need not defer to the state

decision. In such a case, the state court's decision on "the non-Federal ground is so interwoven with the other [federal ground] as not to be an independent matter." Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157 (1917). Thus, where the state court's holding "is not of sufficient breadth to sustain the judgment without any decision of the other [federal issue]," federal courts will not defer to the state court's procedural holding. Id. "In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory." Ake v. Oklahoma, 470 U.S. 68, 75 (1985).

In Ake, this Court refused to honor the finding of waiver by the state court because the procedural rule in Oklahoma depended in part upon a resolution of the federal constitutional claim. Id. In

particular, the procedural bar rule in Oklahoma allowed litigants to raise unpreserved claims if the Oklahoma Court of Criminal Appeals deemed the error "fundamental". "Fundamental" error had been defined in Oklahoma to include federal constitutional error. Id.

As shown below, both aspects of the Texas procedural bar rule depend upon a determination of the underlying federal constitutional claim. When the Texas Court applies its "fundamental error" analysis, it must determine whether the claim presents, inter alia, a violation of the federal constitution. See Nichols v. State, 754 S.W.2d 185 (Tex. Crim. App. 1988). If there is no violation, the error is not "fundamental" and the claim is waived. Furthermore, applying its Chambers analysis, the Texas Court must determine whether the intervening decision creates a right it had not previously recognized.

Thus, in Texas, as in Oklahoma, where the underlying claim is of federal constitutional dimension, a "resolution of the state procedural law question depends on a federal constitutional ruling," Ake v. Oklahoma, 470 U.S. at 75, and thus "is not independent of federal law." Id.

B. The Texas Fundamental Error Rule Depends on Federal Law

The Texas Court of Criminal Appeals has repeatedly held that the fundamental error aspect of its procedural bar rule depends entirely upon the merits of the underlying federal constitutional claim. The most prominent illustration of this appears in Nichols v. State, 754 S.W.2d 185 (Tex. Crim. App. 1988). In Nichols, a capital case, the court considered the following challenge:

> [A]ppellant contends that the trial court fundamentally erred by failing to charge the jury at punishment that they could not rely on the law of parties in

> answering the special issues.... Appellant concedes, however, that he failed to request or object to the absence of such a charge. The failure to object to the charge waives all but fundamental error.

Id. at 198. That is, because appellant had not objected to the charge, only "fundamental error" was before the Court.

The Court then proceeded to review appellant's allegation on the merits of the federal claim, ultimately rejecting it. Applying Enmund v. Florida, 458 U.S. 782 (1982), the Texas Court held that "the failure to give such a charge, absent a request or objection, does not constitute fundamental error."

The syllogism in Nichols, then, is as follows: all claims other than those deemed fundamental error are waived for failure to object to the charge. Appellant's claim, based on a review of the merits of the federal allegation, was judged not to amount to fundamental error.

Therefore, his claim was waived. The operation of the procedural bar rule, in other words, depended entirely on the merits of the federal claim.

Nichols is no aberration; the court of Criminal Appeals has ruled in precisely the same fashion in the context of unpreserved Penry claims. In Sosa v. State, 769 S.W.2d 909 (Tex. Crim. App. 1989), the Court of Criminal Appeals considered whether "fundamental error occurred when the trial court failed to instruct the jury during the punishment phase of the trial that they could consider mitigating circumstances in their deliberations on the special issues. Appellant did not request such an instruction at trial." Under the long-standing rule in Texas, the failure to object to the charge waived all but fundamental error. See e.g., Garrett v. State, 682 S.W.2d at 307. Yet the court

in Sosa, just as in Nichols, reviewed the merits of the unpreserved Penry claim, erroneously rejecting it on the strength of its pre-Penry rulings interpreting the Eighth Amendment. Based on this review, the court found no fundamental error. Thus, as in Nichols, since the merits of the claim presented no error, and since only fundamental error was before the Court, Sosa's claim was waived.[25] Once again, the procedural rule depended entirely on the merits of the underlying

---

[25] Sosa on its face appears to be yet another example of an unpreserved Penry claim reviewed on the merits by the Court of Criminal Appeals. Under the analysis offered here, however, the case is a procedural ruling which depends on the merits. Amicus concedes that Sosa cannot be both a merits and a procedural holding and hence has not included it in the list of cases reviewing unpreserved Penry claims on the merits. Yet manifestly, it is one or the other; either it is a merits ruling, which underscores the fact that there is no procedural bar to Franklin/Penry claims in Texas, or it is a procedural ruling which depends on the merits, which demonstrates that the Texas rule is not an independent state ground.

federal constitutional claim.[26]

---

[26] In its pleadings before the Court of Criminal Appeals in Amicus' case, Respondent expressly conceded that the Texas fundamental error analysis is dependent on the merits of the underlying federal claim. See Ex parte Earvin, No. 70,886, Brief of Amicus Curiae Texas Attorney General, at 15. ("The standard for fundamental error is essentially the same as the federal due process standard...." [citing Ex parte Maldonado, and Cupp v. Naughten.]) More significantly, respondent acknowledges that the analysis of whether the error in Amicus' case was fundamental depends upon the merits of the underlying Penry claim. Brief of Amicus Curiae, at 16-26:

> In Earvin's case, the alleged error cannot be characterized as fundamental. As discussed more thoroughly below, the special sentencing issues directed the jury to consider Earvin's evidence ... and the issues themselves provided the jury with a vehicle for giving mitigating effect to such evidence. Thus, in Earvin's case, the special issues were the substantial equivalent of an instruction directing the jury to consider these factors in mitigation of punishment.

Id. at 16-17. The ensuing merits analysis, which occupies nearly half the brief, attempts to show that "Earvin's case is much more akin to Franklin v. Lynaugh, 108 S.Ct. 2320 (1988), than it is to Penry." (continued...)

To the same effect is Ex parte Coleman, 599 S.W.2d 306 (Tex. Crim. App. 1978). In Coleman, petitioner alleged for the first time on collateral review that the charge to the jury violated federal due process by improperly instructing on an offense other than the one charged. Once again, since nothing was preserved, nothing save fundamental error was before the Court. Yet, as in Nichols and Sosa, the waiver analysis depended entirely on the merits of the federal constitutional claim, which the Court reviewed under Cupp v. Naughten, 414 U.S. 141 (1973) and Henderson v. Kibbe, 431 U.S. 145 (1977).[27]

---

[26](...continued)
Id. at 18. Respondent is mistaken in its view of the merits in Amicus' case, but not in its conclusion that the fundamental error analysis depends on the merits of the underlying constitutional claim.

[27] In 1985, the Texas Court decided Almanza v. State, 686 S.W.2d 157, 171-72 (Tex. Crim. App. 1985), which clarified the test for measuring the harm suffered by a (continued...)

C. The Chambers "Right Not Recognized" Rule

As discussed above, following cases such as Adams v. Texas, Estelle v. Smith, and now, Penry v. Lynaugh, where this Court held that the Texas Court of Criminal Appeals has misconstrued federal law, Texas law requires that failures to object at trial be excused. The Texas Court cannot apply its own state rule without assessing whether the unpreserved claim asserts a right recognized in federal court although not previously acknowledged in the state courts. In every instance in which the

---

[27](...continued)
particular error. Though Coleman was decided prior to the decision in Almanza, Coleman's dependence on federal principles for the purposes of the procedural bar rule was expressly reaffirmed in the post-Almanza decision, Ex parte Maldonado, 688 S.W.2d 114, 116 n.2 (Tex. Crim. App. 1985)("[T]he reasoning in Coleman, along with its embracing the test provided by the Supreme Court in Cupp v. Naughten, 414 U.S. 141, 147 (1973), is the essence of the rationale of Almanza.")

Texas Court has applied this rule, it has first determined whether there exists a federal decision that alters the prior Texas law in some way. See Ex Parte Chambers, Cuevas v. State, Ex Parte Martin,

Thus "the federal-law holding is integral to the state court's disposition of the matter." Ake v. Oklahoma, 470 U.S. 68, 75 (1985). Texas' change in law procedural rule directly "depends on a federal constitutional ruling." Ake v. Oklahoma, supra at 75. Thus where, as here, the procedural bar ruling "is so interwoven with the other [federal ground]," it is not "an independent matter" requiring deference by the federal courts. Enterprise Irrigation District v. Farmers Mutual Canal Co., supra.

CONCLUSION

For the foregoing reasons, there is no procedural bar to federal court review on the merits of Mr. Selvage's Franklin/Penry claims.

Respectfully submitted,

*Robert L. McGlasson
Joseph Margulies

511 W. 7th St.
Austin, Texas 78701
512/320-8300

*Counsel of record for
Amicus Curiae

APPENDIX

TEXAS DECISIONS ON FRANKLIN/PENRY CLAIMS

I. Statutory Preclusion of Consideration of Mitigating Evidence

Havard v. State, No.69,581(June 14, 1989)
Motley v. State, 772 S.W.2d 283 (1989)
Sosa v. State, 769 S.W.2d 916 (1989)
Richardson v. State, 744 S.W.2d 767(1987)
Demouchette v. State, 731 S.W.2d 75(1982)
Cordova v. State, 733 S.W.2d 175 (1987)
Clark v. State, 717 S.W.2d 910 (1986)
Anderson v. State, 701 S.W.2d 868 (1985)
Johnson v. State, 691 S.W.2d 691 (1984)
Stewart v. State, 686 S.W.2d 118 (1984)
Penry v. State, 691 S.W.2d 636 (1985)
Williams v. State, 674 S.W.2d 265 (1984)
O'Bryan v. State, 591 S.W.2d 464 (1979)
Adams v. State, 577 S.W.2d 717 (1979)
Ex Parte Granviel, 561 S.W.2d 503 (1978)
Quinones v. State, 592 S.W.2d 933 (1980)

II. Failure to Clarify Special Issues

James v. State, 772 S.W.2d 84 (1989)
Rector v. State, 738 S.W.2d 235 (1986)
Demouchette v. State, 731 S.W.2d 75(1982)
East v. State, 702 S.W.2d 606 (1985)
Cannon v. State, 691 S.W.2d 664 (1985)
Penry v. State, 691 S.W.2d 636 (1985)
Morin v. State, 682 S.W.2d 265 (1983)
Russell v. State, 665 S.W.2d 771 (1983)
Hawkins v. State, 660 S.W.2d 65 (1985)
DeLuna v. State, 911 S.W.2d 44 (1986)
Wilkerson v. State, 726 S.W.2d 542 (1986)
Penry v. State, 691 S.W.2d 636 (1985)
Wicker v. State, 667 S.W.2d 137 (1984)
Sanne v. State, 609 S.W.2d 762 (1980)
Barefoot v. State, 596 S.W.2d 875 (1980)
Granviel v. State, 552 S.W.2d 107 (1977)
Blansett v. State, 556 S.W.2d 322 (1977)
King v. State, 553 S.W.2d 105 (1977)
Brown v. State, 554 S.W.2d 677 (1977)
Pecillo v. State, 758 S.W.2d 567 (1988)

Question Presented

At the time petitioner was tried, was there "cause" for not raising a claim based upon arguments later accepted in *Penry* v. *Lynaugh*, No. 87-6177 (June 26, 1989); and if not, would the application of a procedural bar to the claim result in a "fundamental miscarriage of justice," *Smith* v. *Murray*, 477 U. S. 478 (1986)?

TABLE OF CONTENTS

Table of Authorities Cited iv

Interest of Amicus 1

Summary of Facts and Case 2

Summary of Argument 4

I
Stability and clarity are desperately needed in the procedural default area 5

II
Only genuinely new rules are sufficiently novel to constitute "cause" under *Reed* v. *Ross* 8

III
New procedural rules are almost never retroactive on habeas under *Teague* 13

IV
Any claim which is "novel" under *Reed* is necessarily "new" under *Teague* 17

A. The basic rule of preclusion 17

B. The timing exception 20

C. Fundamental v. Nonfundamental Rules 21

D. Procedural Default v. "Merits" 23

E. Conclusion 24

V
"Fundamental miscarriage of justice" must be based on substance, not procedure 25

Table of Authorities

Amadeo v. Zant, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988) . 6, 8

Batson v. Kentucky, 476 U. S. 79, 90 L. Ed. 2d 69,
106 S. Ct. 1712 (1986) 18

Bowen v. Kemp, 832 F.2d 546 (11th Cir. 1987) 30

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 2d 469,
73 S. Ct. 397 (1953) 5

California v. Brown, 479 U. S. 538, 93 L. Ed. 2d 934,
107 S. Ct. 837 (1987) 16

Castille v. Peoples, 103 L. Ed. 2d 380, 109 S. Ct. 1056 (1989) . 7

Chambers v. Mississippi, 410 U. S. 284, 35 L. Ed. 2d 297,
93 S. Ct. 1038 (1973) 15

Coker v. Georgia, 433 U. S. 584, 53 L. Ed. 2d 982,
97 S. Ct. 2861 (1977) 27

Desist v. United States, 394 U. S. 244, 22 L. Ed. 2d 248,
89 S. Ct. 1030 (1969) 15

Duckworth v. Eagan, 109 S.Ct. 2875,
106 L.Ed.2d 166 (1989) 22

Dugger v. Adams, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989) .26

Eddings v. Oklahoma, 455 U. S. 104, 71 L. Ed. 2d 1,
102 S. Ct. 869 (1982) 3, 16, 21, 25

Engle v. Isaac, 456 U. S. 107, 71 L. Ed. 2d 783,
102 S. Ct. 1558 (1982) 8, 9, 10, 18, 19, 25

Enmund v. Florida, 458 U. S. 782, 73 L. Ed. 2d 1140,
102 S. Ct. 3368 (1982) 27, 29

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837,
83 S. Ct. 822 (1963) 5, 6

Ford v. Wainwright, 477 U. S. 399, 91 L. Ed. 2d 335,
106 S. Ct. 2595 (1986) 15, 27

Francis v. Henderson, 425 U. S. 536, 48 L. Ed. 2d 149,
96 S. Ct. 1708 (1976) 6

Griffith v. Kentucky, 479 U. S. 314, 93 L. Ed. 2d 649,
107 S. Ct. 708 (1987) 14, 15

Harris v. Reed, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989) . . . 7

Hilton v. Braunskill, 481 U. S. 770, 95 L. Ed. 2d 724,
107 S. Ct. 2113 (1987) 23

In re Winship, 397 U. S. 358, 25 L. Ed. 2d 368,
90 S. Ct. 1068 (1970) 9

Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560,
99 S.Ct. 2781 (1979) 30

Johnson v. New Jersey, 384 U. S. 719, 16 L. Ed. 2d 882,
86 S. Ct. 1772 (1966) 14

Johnson v. Zerbst, 304 U. S. 458, 82 L. Ed. 1461 (1938) 23

Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929,
96 S. Ct. 2950 (1976) 16

Linkletter v. Walker, 381 U. S. 618, 14 L. Ed. 2d 601,
85 S. Ct. 1731 (1965) 14

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973,
98 S. Ct. 2954 (1978) 3, 14, 16, 20, 21, 29

Mackey v. United States, 401 U. S. 667, 28 L. Ed. 2d 404,
91 S. Ct. 1160 (1971) 15

Martin v. Ohio, 480 U. S. 228, 94 L. Ed. 2d 267,
107 S. Ct. 1098 (1987) 10

Matter of Spencer, 228 U. S. 652, 57 L.Ed. 1010 (1912) 5

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694,
86 S. Ct. 1602 (1966) 14

Murray v. Carrier, 477 U. S. 478, 91 L. Ed. 2d 397,
106 S. Ct. 2639 (1986) 6, 8, 23, 25

Penry v. Lynaugh, 109 S. Ct. 2934,
106 L. Ed. 2d 256 (1989) . . . . . Passim

Quinones v. State, 592 S. W. 2d 933, cert. denied,
449 U. S. 893 (Tex. Crim. App. 1980) 20

Reed v. Ross, 468 U. S. 1, 82 L. Ed. 2d 1,
104 S. Ct. 2901 (1984) . . . . . Passim

Rock v. Arkansas, 483 U. S. 44, 96 L. Ed. 2d 37,
107 S. Ct. 2704 (1987) 15

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 14, 22

Selvage v. Lynaugh, 842 F. 2d 89 (5th Cir. 1988) 4

Selvage v. State, 680 S. W. 2d 17 (Tex. Crim. App. 1984) . . . 3

Smith v. Murray, 477 U. S. 527, 91 L. Ed. 2d 434,
106 S. Ct. 2661 (1986) 8, 18, 25, 26

Stanford v. Kentucky, 109 S. Ct. 2969,
106 L. Ed. 2d 306 (1989) 27

Stone v. Powell, 428 U.S. 465, 49 L.Ed.2d 1067,
96 S.Ct. 3037 (1976) 22

Stovall v. Denno, 388 U. S. 293, 18 L. Ed. 2d 1199,
87 S. Ct. 1967 (1967) 14

Sumner v. Shuman, 483 U. S. 66, 96 L. Ed. 2d 56,
107 S. Ct. 2716 (1987) 16

Teague v. Lane, 109 S. Ct. 1060,
103 L. Ed. 2d 334 (1989) . . . . . Passim

Thompson v. Oklahoma, 108 S. Ct. 2687,
101 L. Ed. 2d 702 (1988) 28

Tison v. Arizona, 481 U. S. 137, 95 L. Ed. 2d 127,
107 S. Ct. 1676 (1987) 27, 29

United States v. Frady, 456 U. S. 152, 71 L. Ed. 2d 816,
102 S. Ct. 1584 (1982) 23

United States v. Johnson, 457 U. S. 537, 73 L. Ed. 2d 202,
102 S. Ct. 2579 (1982) 11

Wainwright v. Sykes, 433 U. S. 72, 53 L. Ed. 2d 594,
97 S. Ct. 2497 (1977) 6

In re Wood, 140 U. S. 278, 35 L. Ed. 505 (1891) 5

Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed. 2d 944,
96 S. Ct. 2978 (1976) 16

United States Constitution

U. S. Const. amend. XIV, § 1 23

Treatises

1 W. Blackstone, Commentaries (1765) 14

1 W. LaFave and A. Scott, Substantive Criminal Law,
§ 1.8(c) (1986) 10

Miscellaneous

ABA Criminal Justice Section, Report to the House of
Delegates 6

Friendly, Is Innocence Irrelevant? Collateral Attack on
Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) 22

Lucas, Minority Report of ABA Task Force Co-Chairman 11 (1989) 7

Robbins, Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions in Capital Cases (1989) . 7

Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95 (1987) 21

U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics — 1988 28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN HENRY SELVAGE,

Petitioner,

vs.

JAMES LYNAUGH, Director,
Texas Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

---

1. CJLF has received written consent of the parties to file this brief.

CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on a final judgment based on a claim which defendant did not mention at trial or on appeal and which is not a bedrock rule of fairness. Such unnecessary attack on the finality of criminal judgments is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On July 26, 1979, petitioner John Henry Selvage and his accomplice Wilbur Kelly robbed a convenience store in Houston. One of the robbers, it is not known which, shot a customer to death. Brief for Petitioner ("Pet. Brief") 9-10.

Four days later, Selvage and Kelly robbed Ventura's Jewelry in Houston. One of them shot and killed Deputy Sheriff Al Garza. Although off duty, Garza had prominently displayed his badge prior to the shooting. It is not known which robber fired the fatal shot. *Id.*, at 7. After the shooting of Garza and while they were fleeing the scene, both robbers shot at Stephen Ventura, the owner of the store. *Id.*, at 5-6. Selvage was convicted of the murder of Deputy Garza.

In the penalty phase, the prosecution presented evidence of the convenience store robbery and murder, of Selvage's prior record of drug possession and conspiracy to commit bank robbery and of his attempted escape from jail. *Id.*, at 8-10. The defense presented evidence of Selvage's good upbringing, of the apparently detrimental effect of his military experience and of his potential for rehabilitation. *Id.*, at 10-12.

The jury was instructed on the two relevant Texas special issues, which focus first on deliberateness and expectation that death will result and second on future dangerousness of the defendant. J. A. 4. The jury answered both issues "yes," *ibid.*, and Selvage was accordingly sentenced to death. On direct appeal to the state's highest criminal court, the judgment was affirmed. *Selvage* v. *State*, 680 S. W. 2d 17 (Tex. Crim. App. 1984).

Defense counsel did not accept the instruction in the bare words of the statute as given. He specifically requested a supplemental instruction to the effect that a non-triggerman was completely exempt from capital punishment. J. A. 5-6. At no time during trial or direct appeal, however, did the defense claim that the instructions were deficient for not allowing mental condition or accomplice status to be considered as mitigating factors. See J. A. 30-32; *Selvage* v. *State*, *supra* (enumerating the grounds of error claimed). The trial was conducted approximately two years after *Lockett* v. *Ohio*, 438 U. S. 586 (1978) and two years before *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). The appeal was decided two years after *Eddings*.

In 1985, seven years after *Lockett*, Selvage filed a habeas corpus petition in the federal district court. J. A. 70. This petition made no claim that the jury had not been permitted to consider mitigating factors. J. A. 46. The petition was denied, and the denial was affirmed. J. A. 70.

On March 3, 1987, while federal proceedings were pending, Selvage filed a state habeas petition, which was denied. J. A. 9. On March 22, 1988, ten years after *Lockett* but a year before *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), Selvage filed a state habeas petition raising for the *first* time the mitigation issue. The state trial court found the issue procedurally barred, J. A. 34-35, and the Court of Criminal

Appeals adopted the trial court's findings and conclusions. J. A. 38.

On Selvage's second federal petition, the state objected to the mitigation question on grounds of both abuse of the writ, J. A. 45-50, and procedural bar, J. A. 51-52. The district court dismissed this claim but granted a stay on another claim. J. A. 63-66. The Fifth Circuit Court of Appeals vacated the stay. Although anticipating the holding of *Penry*, *supra*, that the instructions might be found deficient, the court held that the claim was procedurally barred. J. A. 81; *Selvage* v. *Lynaugh*, 842 F. 2d 89, 95 (5th Cir. 1988).

SUMMARY OF ARGUMENT

Selvage contends that he had "cause" not to raise his claim earlier, thus permitting consideration on federal habeas, because his claim was "novel" at that time within the meaning of *Reed* v. *Ross*, 468 U. S. 1 (1984). This contention cannot be reconciled with this Court's decision in *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) that the decision in *Penry* did not announce a "new" rule within the meaning of *Teague* v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

The degree of change from prior precedent which is required for "novelty" as "cause" under *Reed* is substantially *greater* than the degree of change which invokes the nonretroactivity bar of *Teague*. Therefore, absent one of three exceptions not present in this case, *Reed* is a dead letter after *Teague*. Any claim which is sufficiently novel that counsel did not even have "the tools to construct" it at the time of trial must necessarily not be "dictated by precedent existing at the time."

The "fundamental miscarriage of justice" exception, in order to fulfill its function, must be based on an undeniable

injustice of the result and not on the procedure by which that result was obtained. Where guilt is not in question, the penalty-phase application of this exception should be limited to those grounds on which there is an overwhelming national consensus against capital punishment.

I. Stability and clarity are desperately needed in the procedural default area.

The procedural default rule has a long and uneven history in this Court. Impatience with petitioners who omit claims at trial and on appeal and then raise them on federal habeas corpus can be seen as far back as *In re Wood*, 140 U. S. 278, 288-289 (1891) and *Matter of Spencer*, 228 U. S. 652 (1912). "If defenses may be omitted at trials, rights of review omitted, and yet availed of through *habeas corpus*, the whole course of criminal justice will be deranged and, it may be, defeated." *Id.*, at 661.

Stare decisis has not fared well in this area, as this Court has swung from one extreme to the other. In *Brown* v. *Allen*, 344 U. S. 443, 485-487 (1953), this Court held with unmistakable clarity that the bar of procedural default was jurisdictional and mandatory as a corollary to the then-recently-codified exhaustion rule, admitting no exceptions other than incapacity or interference by the state. See also, *Fay* v. *Noia*, 372 U. S. 391, 461-462 (1963) (Harlan, J., dissenting). Yet *Brown* was overruled *sub silento* in *Fay* v. *Noia*, *supra*.

Fay swung to the opposite extreme, substantially abolishing the procedural default rule by limiting it to cases of "deliberate by-passing of state procedures." *Id.*, at 439. Yet as applied in Noia's case, this rule was no rule at all. Noia had intentionally decided not to appeal. He said it was to avoid financial burden to his family; his lawyer said it was to retain the benefit of his

lenient sentence of life. *Id.*, at 396-397, n. 3. Either way, it is difficult to conceive of a bypass more deliberate.

In a series of decisions since *Fay*, this Court has applied a "cause and prejudice" test to defaults occurring before, during and after trial. *Francis* v. *Henderson*, 425 U. S. 536 (1976) (no challenge to grand jury composition); *Wainwright* v. *Sykes*, 433 U. S. 72 (1977) (no contemporaneous objection to evidence at trial); *Murray* v. *Carrier*, 477 U. S. 478 (1986) (omission from appeal). Although not explicitly overruled, there is nothing left of *Fay*'s deliberate bypass test. The cause and prejudice test now applies across the board. *Amadeo* v. *Zant*, 108 S. Ct. 1771, 1776, 100 L. Ed. 2d 249, 259-260 (1988).

The cause and prejudice rule of *Wainwright* v. *Sykes*, *supra*, is thus the resultant vector of two vehemently opposing forces. The law of procedural defaults has swung wildly to one extreme and then to the other and finally settled on a moderate course. The product of such a long and arduous battle should command special respect lest we begin the whole cycle again. The basic rule should not be so riddled with exceptions that the exceptions swallow the rule.

The *Sykes* rule has not been without its detractors. A criticism has been strongly voiced in recent months that the indefinite boundaries of the rule and its exceptions make the rule more complicated than the merits of the petition, delaying and complicating the habeas proceeding. Chief Judge Donald P. Lay of the Eighth Circuit expressed this view in recent hearings before the Senate Judiciary Committee.[2] The ABA Criminal Justice Section has voiced a similar criticism. ABA

2. November 8, 1989. As of this date there does not appear to be a published transcript of this testimony.

Criminal Justice Section, Report to the House of Delegates 24-26 ("ABA Report").[3]

There are three possible solutions to the complication of the rule: (1) abandon the rule and return to *Fay* v. *Noia*; (2) abandon the exceptions and return to *Brown* v. *Allen*; or (3) clarify the rule and limit the exceptions. The opponents of capital punishment naturally call for restoration of *Fay*. See Robbins, Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions in Capital Cases 71-73 (1989) (background paper for ABA Task Force). Others favor the third alternative. See Lucas, Minority Report of ABA Task Force Co-Chairman 11 (1989) reprinted in ABA Report, *supra*, A-2, A-12. Whatever may be the legislative outcome of this debate, the compelling *stare decisis* considerations discussed above point clearly to the third option as the path of judicial development.

The scope of the rule itself was significantly clarified last term. If the claim was presented to the state court, it is only barred if the state court makes a plain statement to that effect. *Harris* v. *Reed*, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). If not presented to the state courts, it is barred if state law clearly bars it. See *Teague* v. *Lane*, 109 S. Ct. 1060, 1067-1069, 103 L. Ed. 2d 334, 346-348 (1989). Habeas claims never presented to the state courts are not exhausted, however, unless "it is *clear* that [the] claims are now procedurally barred under [state] law." *Castille* v. *Peoples*, 109 S. Ct. 1056, 1060, 103 L. Ed. 2d 380, 387 (1989) (italics added). If a claim is not exhausted, the petition should be dismissed on that ground. *Id.*, at 1059, L. Ed. 2d at 385. The state court proceeding which follows dis-

3. This report bears no title other than the above; it is dated February, 1990, even though it was announced in a press release dated November 27, 1989. It is available from the ABA Criminal Justice Section, Washington, D. C.

missal for nonexhaustion should produce the plain statement required by *Harris*.

Other cases have done much to clarify what constitutes "cause." The quintessential "cause" is intentional concealment by state officials of the evidence underlying the claims. See *Amadeo* v. *Zant*, 108 S. Ct. 1771, 1777, 100 L. Ed. 2d 249, 260 (1988). Ineffective assistance of counsel is also cause. *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986). However, the failure of effective counsel to recognize an available factual or legal basis for a claim is not cause. *Id.*, at 486. Neither is an inadvertent failure to raise the issue on appeal, *id.*, at 488, nor a deliberate tactical decision not to pursue a claim, *Smith* v. *Murray*, 477 U. S. 527, 534 (1986).

There remain three principal areas of confusion. The first is when a state procedural bar is not "adequate" despite a plain statement of the state court. The second is the use of novelty of the claim as cause. The third is the scope of the "fundamental miscarriage of justice" exception as applied to sentencing. This case involves the second and third issues,[4] and it can clear up much of the complexity and confusion.

II. Only genuinely new rules are sufficiently novel to constitute "cause" under *Reed v. Ross*.

The issue of novelty of the argument as "cause" under *Sykes* is bracketed by the decisions in *Engle* v. *Isaac*, 456 U. S. 107 (1982) and *Reed* v. *Ross*, 468 U. S. 1 (1984). Both cases involved claims that jury instructions had unconstitutionally shifted the burden of proof to the defendant.

---

4. The first issue is not mentioned in either the questions presented in the petition for certiorari or this Court's restatement of question 1 in the order granting certiorari.

In *Engle*, the defendants claimed self-defense. The juries had been instructed, without objection, that the defense had the burden of proof. The Ohio Supreme Court later decided, as a matter of statutory interpretation, that the prosecution had the burden of proof, 456 U. S., at 111, but upheld its state procedural bar against defendants who had not objected at trial, *id.*, at 116. Isaac and the others contended on federal habeas that regardless of the interpretation of the statute "Ohio could not constitutionally shift the burden of proving self-defense to them." *Id.*, at 121.

Isaac put forth precisely the same reasons for default which Selvage proffers in the present case: novelty and futility. *Id.*, at 130. The Court dealt with futility in no uncertain terms. Futility "*cannot* alone constitute cause . . . . " *Id.*, at 130 (italics added). No matter how solid the wall of authority, the state court *must* be presented with the opportunity to overrule that authority before that argument can be the basis of a federal claim that the prisoner is unconstitutionally detained.

While Isaac's claim of novelty was also rejected, that rejection was not categorical. *Id.*, at 131. The test adopted was whether the tools to construct the constitutional claim were available to the defense. *Id.*, at 133. The necessary tool had been provided years before the trial by *In re Winship*, 397 U. S. 358 (1970). *Engle*, at 131.

To evaluate this "tools" test, it is important to recognize how broad a gap exists between *Winship* and Isaac's claim. The holding of *Winship* is "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U. S., at 364. Isaac did not deny that he had knowingly caused serious physical harm to another, the facts constituting the crime. *Engle*, at 114, n. 12. His defense was that his actions were justified by self-defense. *Id.*, at 114. There is an important difference

between requiring the state to prove the offense and requiring it to disprove a defense. *Martin* v. *Ohio*, 480 U. S. 228, 231-234 (1987) explains this difference at length.

For an earlier case to have provided the tools to construct a claim, then, the claim need not follow directly or inevitably from that case. Reasonable people may differ as to whether the case supports the claim. There may be contrary precedent on point. See *Engle*, 456 U. S., at 133, n. 41.

The claim need not be so obvious that every competent attorney raises it. If significant numbers of lawyers are making the claim, even though many or most are not, then the tools exist. In that event, there is no "cause" for not raising the claim. *Id.*, at 133-134.

In *Reed* v. *Ross* 468 U. S. 1 (1984), the jury in a murder case was instructed that use of a gun raises a presumption of malice shifting the burden of proof to the defendant. *Id.*, at 6-7. The argument against this instruction would seem on its face to be considerably *less* novel than the argument advanced in *Engle*. Malice is traditionally an element of murder to be proved by the prosecution, while self-defense is the kind of affirmative defense which many jurisdictions have required the defendant to prove. See 1 W. LaFave and A. Scott, Substantive Criminal Law § 1.8(c), 71-78 (1986). The *Reed* court distinguished *Engle* by the fact that the trial in *Reed* had occurred before *Winship*. *Reed*, 468 U. S., at 19-20.

Novelty will constitute cause "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Id.*, at 16. The most common instance of a claim without a pre-existing "reasonable basis" is where "this Court has articulated a constitutional principle that had not been previously recognized *but which is held to have retroactive application*." *Id.*, at 17 (italics added). *Reed* then equates "not previously recognized" with the "clear break with the past"

test. *Ibid.* This "clear break" language is taken from *United States* v. *Johnson*, 457 U. S. 537 (1982), where the Court indicated that "clear break" cases are "decisions whose nonretroactivity is effectively preordained." *Id.*, at 553-54.

Reed then identifies three categories of clear breaks, still relying on *Johnson*. The simplest and most obvious is a decision of the Supreme Court overruling one of its own precedents. 468 U. S., at 17. "Second, a decision may 'overtur[n] a longstanding and *widespread* practice to which this Court has not spoken, but which a *near-unanimous* body of lower court authority has expressly approved.' " *Ibid.*, quoting *Johnson* (italics added). These two categories should cause little difficulty for reasons we will explain below.[5]

The principal problem lies in the third category, where a "decision may 'disapprov[e] a practice this Court *arguably* has sanctioned in prior cases.' " *Ibid.*, quoting *Johnson* (italics added). This is a very vaguely defined category. Given the volume of this Court's opinions, the divergence of views among its Members and the creativity of lawyers in extrapolating from opinions, a vast array of practices might be said to have been *arguably* sanctioned.

The test of novelty applied to this category is even more vague.

> "Whether an attorney had a reasonable basis for pressing a claim challenging a practice that this Court has arguably sanctioned depends on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is

---

5. See part IV A at p. 11, *infra*.

from sources opposing the prevailing practice." *Id.*, at 17-18.

The litigation-breeding potential of this test is apparent. It bears more than a passing resemblance to the "test" for retroactivity which this Court has since abandoned as unworkable. See *Teague* v. *Lane*, 109 S. Ct. 1060, 1070-1072, 103 L. Ed. 2d 334, 350-352 (criticism of the *Linkletter* standard).

The threads of retroactivity are woven throughout the fabric of *Reed* v. *Ross*. They show clearly in all three of the opinions filed in that case. The *Reed* majority noted that retroactivity was a distinguishing characteristic of the primary category of cases to which its rule applied. *Reed, supra*, 468 U. S., at 17. The majority also lifted its "clear break" test directly out of retroactivity law. *Ibid.*

Justice Powell rested his deciding vote on the state's own procedural default in not raising the retroactivity issue. *Id.*, at 20. Had the state only raised the issue, *Reed* would have gone the other way.

The dissent noted the paradoxical result of considering "novelty" as "cause" without considering retroactivity:

> "Consequently, we have the anomalous situation of a jury verdict in a case tried properly by then-prevailing constitutional standards being set aside because of legal developments that occurred long after the North Carolina conviction became final.
>
> • • •
>
> "Like the Court of Appeals, the Court proposes to adopt 'novelty' as a possible form of 'cause' under *Wainwright* v. *Sykes* to justify ignoring the State's procedural default rule. But this equating of novelty with cause pushes the Court into a conundrum which it refuses to recognize. The more 'novel' a claimed constitutional right, the more unlikely a violation of that

> claimed right undercuts the fundamental fairness of the trial." *Id.*, at 21-22 (Rehnquist, J., dissenting).

The correction to the anomaly and the solution to the conundrum, we submit, is to *always* consider retroactivity with any *Reed* claim. When this is done within the structure of *Teague* v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), the difficulties anticipated by the *Reed* dissent disappear, and the question of fundamental fairness will become central to the decision.

III. New procedural rules are almost never retroactive on habeas under *Teague*.

The essence of a habeas petitioner's *Reed* claim is that the law has changed in an unexpected way and that he should not be "punished" for a lack of clairvoyance. But are the people of a state not entitled to make the same claim? Should a judgment that was perfectly legal when entered be set aside because a court did not follow a procedure which it had no obligation to follow at the time? The people's side of the unexpected change ledger is the issue of retroactivity. The crux of this case is the inconsistency between defendant's claim of novelty and the holding of *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) on the retroactivity question.

Teague v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)[6] is the culmination of this Court's long and difficult struggle with the question of how far back a new decision should reach in undoing the work of judges, lawyers and juries who had duly obeyed the rules in effect at the time. Whenever a rule is not applied retroactively, the contention is made that the Court

---

6. *Teague* is a plurality opinion, but its rule was accepted by a majority in *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2944, 106 L. Ed. 2d 256, 274 (1989).

has sanctioned a constitutionally flawed conviction or denied someone his constitutional rights. See, *e.g.*, *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (1966) (Black, J., dissenting). That would be true if one subscribed to the Blackstonian belief that the Court merely discovers pre-existing law and does not make new law. See 1 W. Blackstone, Commentaries 69-70 (1765). However attractive the Blackstone approach may be in theory, it loses any connection with reality when applied to requirements as far removed from the text and history of the Constitution as the *Miranda* warnings, the exclusionary rule or the rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978).

There are, no doubt, people in prison today who were convicted before *Miranda* v. *Arizona*, 384 U. S. 436 (1966) based largely on voluntary confessions obtained without the now-required warnings. Yet their continued incarceration is not the result of any denial of any constitutional right. The prisoner was legally convicted because the right to warnings simply did not exist at the time; this Court created that right in *Miranda*. There may be doubts about the legitimacy of creating "constitutional" rights so far removed from either the text or fundamental fairness, see *Rose* v. *Lundy*, 455 U. S. 509, 543-544, n. 8 (1982) (Stevens, J., dissenting), but no realistic appraisal can deny that that is what the *Miranda* Court actually did.

With the recognition that some rules are genuinely "new" came a need to decide how far back to apply these new rules. A three-part test to be applied separately to each new rule was laid down in *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967). This test was heavily dependent on the value judgments of the judges applying it, however, and application of it was inconsistent. See *Teague*, *supra*, 109 S. Ct., at 1072, 103 L. Ed. 2d, at 352.

In *Griffith* v. *Kentucky*, 479 U. S. 314 (1987) and *Teague* v. *Lane*, *supra*, the *Linkletter-Stovall* approach was replaced by

the approach suggested by Justice Harlan in *Desist* v. *United States*, 394 U. S. 244, 256-269 (1969) (dissent) and *Mackey* v. *United States*, 401 U. S. 667, 675-702 (1971) (separate opinion). All new rules now apply to all cases on direct review, *Griffith*, 479 U. S., at 323, and with two rare exceptions do not apply to cases which became final prior to the announcement of the rule, *Teague*, 109 S. Ct., at 1075, 103 L. Ed. 2d, at 356.

The first step in a *Teague* analysis is to determine whether a rule is "new." "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.*, at 1070, L. Ed. 2d, at 349. The examples given illuminate the meaning of this sentence. *Rock* v. *Arkansas*, 483 U. S. 44 (1987) broke new ground by extending the right to present a defense, established in *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), into the previously uncharted territory of hypnotically refreshed testimony. *Ford* v. *Wainwright*, 477 U. S. 399 (1986) imposed a new obligation on the states by constitutionalizing the long-established common-law prohibition of execution of the insane. Neither claim was novel. *Chambers* and the common law provided ample tools to construct the respective claims. Yet both are "new rules" under *Teague*.

The *Teague* Court's alternative formulation of newness is more emphatic. "To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 109 S. Ct., at 1070, 103 L. Ed. 2d, at 349 (italics in original). Because no precedent existing at that time could be said to dictate that the fair cross-section requirement extended to the petit jury, such an extension would be a new rule. *Ibid.*

Penry v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) presented an unusual twist on the newness problem. The difficulty in the question presented in *Penry* was not caused by a dearth of authority but rather by an excess. A tension exist-

ed between two lines of cases decided by this Court, see *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'Connor, J., concurring), and either side could construct a reasonable argument using one of the two lines.

In *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976), a plurality held that capital sentencing must take into account relevant facets of the defendant's character and record, including "compassionate or mitigating factors stemming from the diverse frailties of humankind." In *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978), the plurality found a constitutional requirement that "the sentencer . . . not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[7] *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) raised the *Lockett* plurality rule to majority status.

Taking these authorities alone, the *Penry* case would have been a foregone conclusion. Asking the jurors to decide if the murder was deliberate, if the defendant will be dangerous in the future and if the defendant overreacted to any provocation did not permit consideration as mitigation of Penry's abused childhood, precisely the type of mitigation that *Eddings* had held must be considered. 455 U. S., at 113-115. The problem was that the Texas system of asking only these three questions had been sustained against a facial attack in *Jurek* v. *Texas*, 428 U. S. 262 (1976). Four Justices of this Court believed that *Jurek* and not *Eddings* dictated the result. *Penry*, 109 S. Ct., at 2965, 106 L. Ed. 2d, at 300 (Scalia, J., dissenting in part).

---

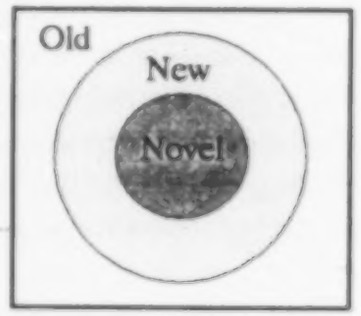
7. Italics in original. A footnote at this point reserves the life prisoner question subsequently decided in *Sumner* v. *Shuman*, 483 U. S. 66 (1987).

The "newness" issue in *Penry* and the merits of the decision thus both turn on the interpretation of *Jurek*. *Penry* says that *Jurek* did not give a blanket endorsement to the Texas manner of instructing the jury without regard to whether those instructions permitted consideration of all mitigating evidence proffered in a particular case. Rather, says *Penry*, *Jurek* was based on an assurance, not fulfilled in Penry's case, that all such evidence would be considered. *Id.*, at 2946-2947, L. Ed. 2d, at 278. If *Penry* is new then it is also wrong on the merits.[8] If *Penry* is correct on the merits, then its interpretation of *Jurek* must also be correct. *Penry* therefore does not "gut" *Teague*, see *id.*, at 2965, L. Ed. 2d, at 301 (Scalia, J., dissenting in part), but rather leaves it untouched. A rule is new if it is not dictated by prior precedent. Accepting the *Penry* majority's interpretation of *Jurek*, *Penry* is indeed dictated by *Lockett-Eddings*.

IV. Any claim which is "novel" under *Reed* is necessarily "new" under *Teague*.

A. The Basic Rule of Preclusion.

When the definition of "new rules" is juxtaposed with the definition of "novel claims" we can see that "novel" is a subset of "new." That is, any claim which is "novel" under *Reed* must necessarily be "new" under *Teague*, at least if newness and novelty are determined as of the same time. The converse, however, is not necessarily true. Most claims will cease to be novel under *Reed* long before the rules they propose cease to be new under *Teague*.



---

8. Defendant's interpretation of *Jurek*, Pet. Brief 57-58, is essentially the same as that of the *Penry* dissent.

Returning to the three categories of potentially novel claims outlined in *Reed* v. *Ross*, 468 U. S. 1, 17 (1984), the first category is a square overruling by this Court of one of its own precedents. While *Reed* correctly notes that a claim based on the overruling case would be novel, *ibid.*, there can also be no doubt that such a claim would be new under *Teague*. See *Teague*, 109 S. Ct., at 1067, 103 L. Ed. 2d, at 345-346 (reaffirming nonretroactivity on habeas of *Batson* v. *Kentucky*, 476 U. S. 79 (1986)).

The second category requires that the disapproved practice had been both longstanding and widespread and had been approved by a nearly unanimous body of lower court opinion. *Reed*, at 17. Again, there can be no question that the disapproval of such a body of case law would be a new rule under *Teague*.[9]

The present case fits in the third category: disapproval of a practice arguably sanctioned by past Supreme Court cases. *Ibid.* The prior sanction of the disapproved practice is certainly arguable if the argument was accepted by four Justices of this Court, see *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2965-2967, 106 L. Ed. 2d 256, 301-303 (1989) (Scalia, J., dissenting in part). Yet arguable sanction alone is not enough for novelty. *Reed* also considers directness of the sanction, entrenchment of the practice in the relevant jurisdiction and strength of available support for opposing the practice.

Comparing *Reed* with *Engle* v. *Isaac*, 456 U. S. 107 (1982), it is apparent that the entrenchment factor cannot alone make a claim novel. *Engle* held that even complete futility cannot alone constitute cause, *id.*, at 130, and this holding was reaffirmed after *Reed* in *Smith* v. *Murray*, 477 U. S. 527, 535

---

9. The present case does not fall into this category, as the Texas practice is not widespread. Defendant says it is unique. Pet. Brief 65.

(1986). *Reed* also considers the directness of this Court's sanction of the practice, but if the sanction were truly direct the case would fall into the first category (outright overruling) and not the third.

The principal focus, then, must be on "how strong the available support is from sources opposing the prevailing practice." *Reed*, 468 U. S., at 17-18. This focus is consistent with *Engle* and *Smith*, because the basic question is whether defense counsel had the tools to construct the claim, *Engle*, 456 U. S., at 133, not whether the prosecution had the tools to tear it down. Here the inconsistency of the defense's position becomes glaring.

If a rule is *dictated* by existing precedent of the Supreme Court, then the available support from opposing sources is not merely "strong"; it is by definition overpowering. A finding that the rule is not new under *Teague* thus establishes the strength factor of *Reed* to such a degree that it necessarily overrides the other two factors. How can anyone say that a result is dictated by precedents of the Supreme Court and yet maintain that counsel lacks the tools to construct that claim?

The argument to that effect really should be written by Lewis Carroll, but defense counsel turns in a reasonable impersonation. For evaluating whether a rule is new under *Teague*, the argument goes, this Court should interpret its prior opinions in the way it has in the past, but for the *Reed* novelty evaluation the Court should jump through the looking-glass into a reversed world where all the rules are different. See Pet. Brief 76-79. Legal practitioners immersed in the local system, we are told, are somehow excused from reading and understanding this Court's precedents. See *id.*, at 79.

The argument just does not hold water. Whatever deficiencies American legal education may have in other respects, it does teach lawyers to do one task very well: to read, under-

stand and interpret appellate decisions. We all read the same cases. Law school has made sure we know how. There is no justification for the double standard defendant proposes.

Penry's holding that its rule is not "new" for *Teague* precludes the contention that the claim is "novel" for *Reed*. Conversely, a finding of novelty would require that *Penry* be fully or partially overruled and that the rule established in that case either overturned or at least not applied to any sentence which became final before June 26, 1989. Either way, defendant cannot claim the benefit of *Penry*.

B. The Timing Exception.

There is one exception worth noting to the general rule of preclusion. Novelty for *Reed* and newness for *Teague* are not determined as of the same time. *Reed* looks at the time of the procedural default, 468 U. S., at 13, while *Teague* looks to the date the conviction became final, 109 S. Ct., at 1075, 103 L. Ed. 2d, at 356. It is remotely possible that the law could take such a radical turn in the interim that a claim which was unavailable at the time of the default had become dictated by precedent by the date of finality.

This possibility need not detain the Court in the present case, because no such radical turn in the law occurred between the 1980 trial and the 1984 finality. The plurality opinion in *Lockett* v. *Ohio*, 438 U. S. 586 (1978) provided the tools to construct the claim in 1980, and Penry's lawyer used them to do exactly that. See *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2942, 106 L. Ed. 2d 256, 273 (1989); see also *Quinones* v. *State*, 592 S. W. 2d 933, 947 (Tex. Crim. App. 1980), cert. denied, 449

U. S. 893.[10]

Between trial and finality, the only important development was the elevation of the *Lockett* plurality rule to majority status in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). The distinction between a plurality and a majority is important for determining when a rule is dictated by existing precedent,[11] but it is not important for deciding whether counsel had the tools to construct the claim. No competent lawyer would abandon a claim based on a decision of the Supreme Court merely because it was a plurality decision. In the death penalty area especially, most of this Court's jurisprudence has started out as plurality decisions. See generally, Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 107-110 (1987). Furthermore, *Lockett* contains a solid majority on the need to consider Selvage's principal mitigating factors of accomplice status and lack of intent to kill. See *Lockett*, 438 U. S., at 615-616 (Blackmun, J., concurring in the judgment).

C. Fundamental v. Nonfundamental Rules.

If a rule must necessarily be new in order to be novel, two difficulties anticipated in *Reed* vanish. The *Reed* dissent noted that "novel" claims were unlikely to affect the fundamental fairness of the trial, 468 U. S., at 22 (Rehnquist, J., dissenting), but a novel procedural claim can now apply on habeas *only* if it

---

10. Selvage's trial and Penry's took place in February and March, respectively, of 1980. J. A. 8; 109 S. Ct., at 2941, 106 L. Ed. 2d, at 271. *Quinones* was decided in January but did not become final until denial of certiorari in October. The issue was very much alive at the time of Selvage's trial.

11. Defendant assumes that *Lockett* and not *Eddings* is the cut-off date for application of the *Penry* rule. Pet. Brief 76. Amicus disagrees, but this case does not present that question.

qualifies for the second *Teague* exception; it must involve on "absolute prerequisite to fundamental fairness" the absence of which "seriously diminish[es] the likelihood of obtaining an accurate conviction." *Teague* v. *Lane*, 109 S. Ct. 1060, 1077, 103 L. Ed. 2d 334, 358-359 (1989). *Substantive* claims that an act cannot be punished at all qualify for the other exemption. *Id.*, at 1073, L. Ed. 2d, at 353. Thus, the novel but peripheral claims anticipated by the dissent are excluded.

On the other hand, the *Reed* majority was concerned that refusal to recognize novelty as cause would result in defense counsel inundating the trial court with "any and all remotely plausible constitutional claims that could, some day, gain recognition." *Reed*, 468 U. S., at 15-16. If a claim of error is so fundamental as to qualify for the second *Teague* exception, competent counsel will surely raise it to preserve it for appeal, regardless of what rules may apply on habeas. If the claimed error is not so fundamental, *Teague* has eliminated any incentive to object merely to preserve the claim for habeas.

The interaction of the procedural default rule and the *Teague* nonretroactivity rule thus form another step in the evolution of habeas corpus. That evolution, in recent years, has begun to move away from relitigation *ad infinitum* of the detailed code of criminal procedure now deemed to be incorporated in the Due Process Clause, see [illegible]dly, Is Innocence Irrelevant? Collateral Attack on Criminal [illegible]dgments, 38 U. Chi. L. Rev. 142, 155-156 (1970), and toward a focus on fundamental fairness and actual innocence. *Teague* removed retroactivity for nonfundamental procedural claims. *Stone* v. *Powell*, 428 U. S. 465 (1976) eliminated most of the exclusionary rule claims. Some Members of the Court would go further. See *Rose* v. *Lundy*, 455 U. S. 509, 547 (1982) (Stevens, J., dissenting) (eliminate nonfundamental claims altogether); *Duckworth* v. *Eagan*, 109 S. Ct. 2875, 2881, 106 L. Ed. 2d 166, 179 (1989) (O'Connor, J., concurring) (eliminate *Miranda* claims).

Murray v. *Carrier*, 477 U. S. 478, 496 (1986) recognized the importance of actual innocence.

Recognition of the rule amicus proposes would be a significant step along this path. Claims of fundamental unfairness raising serious doubt of the guilt of the accused could go forward under *Reed* regardless of procedural default, but peripheral claims dreamed up only after a defendant's main contentions have failed would always be barred by either the procedural default rule or the nonretroactivity rule.

D. Procedural Default v. "Merits."

Because debate on the procedural default rule usually invokes calls to forget procedure and go to the "merits," a few words on that point may be in order. Although the procedural default rule is based on the procedure at trial and on appeal, it *does* go to the merits of the habeas petition. A habeas proceeding is not an appeal. *United States* v. *Frady*, 456 U. S. 152, 165 (1982). It is a civil lawsuit by a prisoner against officers of the state, accusing them of violating the Constitution, laws or treaties of the United States. 28 U. S. C. § 2254(a); *Hilton* v. *Braunskill*, 481 U. S. 770, 776 (1987). The state is no longer accusing the petitioner; that proceeding is over and final. The petitioner is accusing the state. That is why he has the burden of proof. See *Johnson* v. *Zerbst*, 304 U. S. 458, 468-469 (1938).

The procedural default rule is not a forfeiture or penalty imposed on the accusing petitioner; it is an affirmative defense afforded to the accused state. Virtually all federal habeas claims today are ultimately based on the requirement that a state not "deprive any person of life, liberty, or property, without due process of law." U. S. Const. amend. XIV, § 1. This clause, along with all that is deemed incorporated in it, does not require state trial judges to scrutinize their procedures *sua sponte* for every creative challenge that might some day find

favor with this Court. The state may properly place the burden of raising most objections on the defendant.

If the defendant has been provided with an effective attorney, if the trial is conducted in accordance with the bedrock elements of procedural fairness which are central to an accurate determination of guilt,[12] and if the trial judge and appellate court rule correctly on all objections made by the defense,[13] then the officials of the state have done their job correctly. That being the case, the fundamental element of the habeas petitioner's cause of action is missing. He has received the process due. His custody is not in violation of the Constitution of the United States. The state court's "error" in not sustaining an objection which the defendant *never made* does not alter that conclusion. A ruling on the procedural bar *is* thus a ruling on the merits of the habeas petition.

E. Conclusion.

A claim ceases to be novel under *Reed* v. *Ross*, 468 U. S. 1 (1984), at the very latest, when it ceases to be new under *Teague* v. *Lane*, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). In most cases it will have ceased to be novel long before. Absent a radical shift in the law between the date of default and the date of finality, a holding that a rule is not new under *Teague* absolutely precludes any contention that a claim under that rule is novel under *Reed*. A rule which is new under *Teague*, and therefore potentially novel under *Reed*, is retroactive on habeas corpus only in two rare circumstances not present in

---

12. If not, the second *Teague* exception applies. See 109 S. Ct., at 1076, 103 L. Ed. 2d, at 357. Furthermore, failure to object to a *fundamentally* unfair procedure in any modern trial would be ineffective assistance.

13. A "correct" ruling is one made in accordance with the precedents established by this Court as of the date of finality.

this case. *Teague*, 109 S. Ct., at 1075-1077, 103 L. Ed. 2d, at 356-358.

Penry v. *Lynaugh*, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) therefore cannot be the basis for overturning Selvage's sentence. He failed to raise the objection at trial, and his claimed excuse for not objecting is irreconcilable with the holding of *Penry* that the rule in that case applies to cases which became final after *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) but before *Penry*.

V. "Fundamental miscarriage of justice" must be based on substance, not procedure.

Where the verdict itself is correct, *i.e.*, the defendant is actually guilty, there is nothing unfair about a procedural bar blocking a claim which is itself procedural. In *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982), this Court expressed its confidence that "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." In *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986), the Court recognized that there might be extraordinary cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," and recognized actual innocence as a separate exception to the procedural bar rule, independent of the cause and prejudice test.

The difficulty comes in applying this exception to capital sentencing where guilt is not in issue. In *Smith* v. *Murray*, 477 U. S. 527 (1986), the purported error had to do with the defendant's admission of prior misconduct during a psychiatric interview arranged by his own attorney. *Id.*, at 529-530. Acknowledging the difficulty of translating actual innocence into the penalty phase, the Court concluded that the admission of the evidence "did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* peti-

tioner constituted a continuing threat to society." *Id.*, at 538 (italics in original).

The intended emphasis in this statement appears to be on the jury's reaching an acceptable result based on all of the information available, even though some of that information may have been illegally obtained. The reference to perverting the jury's deliberations, however, might be construed to open up any claim of procedural error in instructing the jury, selecting the jury or arguing to the jury.

The latter interpretation was adopted by the dissent in *Dugger* v. *Adams*, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989). Adams was sentenced to death for molesting and murdering an eight-year-old girl. *Id.*, at 1213, n. 2, L. Ed. 2d, at 441, n. 2. The trial court instructed the jury that their recommendation was only advisory. *Id.*, at 1213, L. Ed. 2d, at 440. The dissent claimed that this "alleged error is thus global in scope: it necessarily pervades the entire sentencing process." *Id.*, at 1224, L. Ed. 2d, at 453 (Blackmun, J., dissenting).

The *Adams* majority, however, rejected this process-based approach to fundamental miscarriage of justice.

> "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' *Carrier*, *supra*, at 496, into an all too ordinary one." *Id.*, slip op. at 11, n. 6, S. Ct., at 1218, L. Ed. 2d, at 446.

This passage tells us what fundamental miscarriage of justice is not, but regrettably does not tell us what it is. The answer, amicus submits, is to look solely at the substance of

the result, disregard all procedure and resolve all discretionary questions in favor of the verdict. By doing so, we can expose those injustices which are truly fundamental while restraining judicial interference based on disagreement with the sentencer or the legislature.

For guilt phase error the test of fundamental miscarriage of justice is actual innocence. Why? Because *everyone* agrees that throwing an innocent man in prison is an injustice. There are no questions of policy here. There is no room for discretion. The purpose of our judicial system is to convict and punish the guilty. No rational person believes we should convict the innocent.

An injustice is *fundamental*, justifying an exception to the procedural bar rule, when there is near unanimity among the American people that people in the petitioner's situation should not receive the punishment. On the other hand, a sentence is not a miscarriage of justice at all, much less a fundamental one, if the sentence is a legal one for the crime committed and if a reasonable sentencer might well impose that sentence for that crime.

The perimeter of authorized capital sentencing has been staked out by this Court with great care and with explicit reference to the beliefs of the American people. See *Stanford* v. *Kentucky*, 109 S. Ct. 2969, 2975-2976, 106 L. Ed. 2d 306, 318-319 (1989). Death is not a permissible sentence for rape, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality), and presumably not for other nonfatal crimes against individuals. Crimes against sovereignty, such as treason and espionage, have yet to be considered. Death is also not permissible in the case of a nontriggerman without either intent to kill, *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982), or major participation plus reckless disregard for life, *Tison* v. *Arizona*, 481 U. S. 137, 157-158 (1987). Several groups are immune from capital punishment: the insane, *Ford* v. *Wainwright*, 477 U. S. 399 (1986);

persons under 16, at least without a legislatively-set minimum age, *Thompson* v. *Oklahoma*, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988); and probably the severely or profoundly retarded, see *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2954, 106 L. Ed. 2d 256, 287 (1989).

This extensive set of restrictions, combined with the state statutory system, defines which murderers are death-eligible. If the defendant is *in fact* a murderer, if his crime does *in fact* fit the state's definition of a capital offense, and if neither he nor his crime *in fact* comes within any of the excluded classes above, then death is an authorized sentence which our society has determined to be not cruel and not grossly disproportionate. This detailed and exhaustive body of law, built up so painfully over so many years, has identified and excluded those cases where a death sentence would be a fundamental miscarriage of justice. The remainder of cases are those where reasonable people may differ as to whether death is the appropriate punishment.[14] If a particularly hard-nosed sentencer could legitimately impose the sentence following an absolutely perfect trial and sentencing hearing, then that sentence is not a fundamental miscarriage of justice.

The present case illustrates the point. Giving Selvage the benefit of the doubt, we will assume that his accomplice, Kelly, was the "triggerman" in both killings. See Pet. Brief 30-31, n. 16. By Selvage's own admission, then, he robbed the convenience store, and in the course of that robbery Kelly shot and killed an innocent customer. A mere four days later, with the actual knowledge that Kelly is a "wild man" who shoots people

---

14. The overwhelming majority of the American people favor capital punishment for murder, including an absolute majority in *every* demographic group surveyed. U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics — 1988 at 223. Twenty-nine percent favor it in *all* murder cases, and eleven percent oppose it in all cases. *Id.*, at 230.

in the course of his robberies, Selvage committed another robbery with Kelly. Both of them were armed, and Selvage personally fired his gun at a person. Pet. Brief at 6.

Although Selvage's accomplice status is relevant, his degree of participation and resulting culpability are far greater than Earl Enmund's, see *Enmund* v. *Florida*, 458 U. S. 782, 784-785 (1982) or Sandra Lockett's, see *Lockett* v. *Ohio*, 438 U. S. 586, 590-591 (1978). Selvage's personal act of shooting at Mr. Ventura makes his participation and his reckless disregard for life greater than that of the Tison brothers in *Tison* v. *Arizona*, 481 U. S. 137, 139-141 (1987).

In addition to his accomplice status and his mens rea (extreme recklessness rather than intent), defendant relies heavily on his psychiatric testimony. Pet. Brief 21-27. If Selvage were genuinely insane then his execution would be a fundamental miscarriage of justice. "Mental illness short of that," as defendant characterizes it, Pet. Brief 108, is a very different matter. The sentence would still be well within the discretion of the sentencer, and a great many people would give little or no mitigating weight to the psychiatric testimony. The trial judge seems to have been particularly unimpressed with the psychiatrist. See J. A. 33.

In summary, then, defendant's contention that he does not deserve his sentence is merely an opinion with which a great many reasonable people would disagree. Many of them would consider any lesser sentence to be a miscarriage of justice. In light of the expansion of the excluded classes in *Thompson* and *Penry*, *supra*, and the very substantial support for capital punishment for all murders, see note 14, *supra*, this will be true any time the crime and the defendant do not fall into any of

the excluded classes described above.[15]

A habeas petitioner is "actually innocent" of a death sentence if, considering all available facts, the sentence was not legally within the discretion of the sentencer to impose. Selvage's sentence was well within the sentencer's discretion, and therefore it is not a fundamental miscarriage of justice.

Conclusion

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Dated: December, 1989

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

---

15. At one time, counsel for amicus proposed a "no rational person could differ" standard. Cf. *Jackson* v. *Virginia*, 443 U. S. 307, 313 (1979). After observing the misapplication of the harmless error rule in capital cases, see, *e.g.*, *Bowen* v. *Kemp*, 832 F. 2d 546, 553 (11th Cir. 1987) (Fay, J., dissenting), *id.*, at 554 (Edmondson, J., dissenting), it appears that such an indefinite rule offers too much temptation for those inclined to second-guess the sentencer.